No. 3038

United States
Circuit Court of Appeals

For the Ninth Circuit.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error,

Transcript of Record.

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Supreme Court of the Territory of Hawaii.

(Stamped $2.00.)

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants.

Petition for Writ of Error.

To the Supreme Court of the Territory of Hawaii:

The petition of Caroline J. Robinson, plaintiff in error herein, respectfully shows that on or before the tenth day of July, 1916, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, after a trial, jury waived, before the Honorable Clarence W. Ashford, First Judge of the Circuit Court of the First Judicial Circuit, a decision was rendered in favor of the defendants in a cause of Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants; that pursuant to the decision rendered as aforesaid, judgment in favor of the said defendants was, on the 18th day of July, 1916, duly entered in the said Circuit Court of the First Judicial Circuit of the Territory of Hawaii; that during the course of the trial of the said cause certain rulings and errors of law were made by the said Circuit Court against the said

plaintiff, to which said rulings counsel for said plaintiff duly excepted. [1*]

That said plaintiff deems herself aggrieved by the decision of the said First Judge of the Circuit Court of the First Judicial Circuit, rendered as aforesaid, by the rulings and judgment rendered by the said Circuit Court and by other errors of law then and there had, all of which more particularly appear in the assignment of errors herein and filed herewith.

That execution on the said judgment has not at this date been duly satisfied, and six months have not yet elapsed since the rendition of the said judgment.

WHEREFORE your petitioner, the plaintiff in error herein, respectfully prays that a writ of error issue out of and under the seal of this Court directed to the Clerk of the said Circuit Court of the First Judicial Circuit of the Territory of Hawaii, commanding him, the said Clerk, to send and duly certify to this Court, all records, pleadings, commissions, demurrers, exhibits, files, affidavits, minutes, judgment, transcripts of testimony and proceedings taken and filed in the said cause to the end that this Court may view the same and correct any and all errors, if any there be, therein.

Dated, Honolulu, T. H., January 9th, 1917.

CAROLINE J. ROBINSON,
Petitioner.

By HOLMES and OLSON and
PAUL R. BARTLETT,
Her Attorneys. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

Territory of Hawaii,
City and County of Honolulu,—ss.

Personally appeared Paul R. Bartlett, who, being duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiff in error; that he has read the foregoing petition, knows the contents thereof and that the allegations therein are true.

PAUL R. BARTLETT.

Subscribed and sworn to before me this 9th day of January, 1917.

[Notarial Seal] FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: No. 993. In the Supreme Court of the Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Petition for Writ of Error. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Plaintiff. Filed January 9, 1917 at 3:25 P. M. J. A. Thompson, Clerk. [3]

In the Supreme Court of the Territory of Hawaii.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Notice of Issuance of Writ of Error.

To Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased:

YOU WILL PLEASE TAKE NOTICE that a writ of error in the above-entitled cause has been issued by the Clerk of the Supreme Court of the Territory of Hawaii on this ninth day of January, 1917, on the application of the above-named plaintiff in error for the removal of the record, proceedings and judgment in the original cause from the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, to the Supreme Court of the Territory of Hawaii, and that a true and correct copy of the assignment of errors filed at the time of procuring said writ of error is hereto attached and herewith served upon you, which cause is still pending.

By HOLMES and OLSON and
PAUL R. BARTLETT,
Attorneys for Caroline J. Robinson, Plaintiff in Error.

We hereby accept service of the foregoing notice of issuance of writ of error and copy of assignment of errors dated this ninth day of January, 1917.

ANDREWS & PITTMAN,

Attorneys for Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased. [4]

In the Supreme Court of the Territory of Hawaii.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Assignment of Errors.

Now comes Caroline J. Robinson, plaintiff in error herein, by her attorneys, Holmes & Olson and Paul R. Bartlett, Esquire, and says that in the record and proceedings in a cause lately pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, entitled "Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants," there are divers and manifest errors, and that the said plaintiff now makes and presents the following assignment of errors upon which she relies before this Court for relief as follows:

1. That said Circuit Court erred in making and entering judgment in said cause in favor of the defendants therein and against the plaintiff.

2. That said Circuit Court erred in rendering judgment in said cause in favor of the defendants, Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, and in adjudging that plaintiff take nothing by [5] her writ, and that the said defendants Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, recover from the plaintiff their costs of suit in the sum of Four Hundred Eighty-one Dollars and Fifty-five Cents ($481.55).

3. That the said Circuit Court erred in not rendering judgment in the said cause in favor of the plaintiff.

4. That said Circuit Court erred in holding that certain conveyances made by Eliza Roy to William F. Roy did not constitute a breach of the agreement set forth in the bill of complaint in said cause, said agreement having been entered into between Eliza Roy and Caroline J. Robinson, plaintiff in error herein.

5. That said Circuit Court erred in not holding that said conveyances made by Eliza Roy to William F. Roy did constitute a breach of the agreement entered into by the said Eliza Roy and Caroline J. Robinson, plaintiff in error herein.

6. That the said Circuit Court erred in finding that by assent and ratification, plaintiff in error herein, excluded herself from the right to set up said conveyances by Eliza Roy to William F. Roy as a

breach of the agreement between Eliza Roy and Caroline J. Robinson.

7. That the said Circuit Court erred in finding that by reason of such alleged assent and ratification, plaintiff in error herein was debarred from resorting to the enforcement of the payment of the promissory notes as in the bill of complaint set forth. [6]

8. That the said Circuit Court erred in holding that the indebtedness contracted by Eliza Roy in violation of the terms and conditions of the agreement entered into by Eliza Roy and plaintiff in error did not make the indebtedness and interest thereon, specifically enumerated in said agreement, immediately become due and payable by Eliza Roy, her heirs, executors, administrators and assigns, to plaintiff in error.

9. That the said Circuit Court erred in not holding that the indebtedness contracted by Eliza Roy in violation of the terms and conditions of the agreement entered into by Eliza Roy and plaintiff in error made the indebtedness and interest thereon, specifically enumerated in said agreement, immediately become due and payable by Eliza Roy, her heirs, executors, administrators and assigns, to the plaintiff in error.

WHEREFORE the said plaintiff in error respectfully prays that the decision and judgment rendered and entered in the cause aforesaid, on account of the manifest errors aforesaid, be reversed, vacated and set aside, and that the said cause be remanded to the Circuit Court of the First Judicial Circuit for such

disposition as may be just and proper in the premises.

Dated, Honolulu, T. H., January 9th, 1917.

CAROLINE J. ROBINSON,
Plaintiff in Error.
By HOLMES and OLSON and
PAUL R. BARTLETT,
Her Attorneys.

[Endorsed]: No. 993. In the Supreme Court of the Territory of Hawaii. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Notice of Issuance of Writ of Error and Assignment of Errors. Filed January 9, 1917, at 3:25 P. M. J. A. Thompson, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Pltf. in Error. [7]

In the Supreme Court of the Territory of Hawaii.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

$1.00 Stamp.

CAROLINE J. ROBINSON,
Plaintiff in Error,
vs.
LORRIN A. THURSTON and JOHN D. PARIS,
Executors Under the Will of ELIZA ROY,
Deceased,
Defendants in Error.

Bond.

KNOW ALL MEN BY THESE PRESENTS: That Caroline J. Robinson, as principal, and the

Fidelity and Deposit Company of Maryland, as surety, are bound and firmly held unto Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, in the penal sum of four Hundred Eighty-one Dollars and Fifty-five Cents ($481.55) with interest thereon at the rate of six per cent (6%) per annum from the eighteenth day of July, 1916, for the payment of which, well and truly to be made, they do bind themselves, and their respective heirs, executors, administrators successors and assigns, jointly, severally and firmly, by these presents.

Signed with their names and sealed with their seals on this ninth day of January, 1917.

THE CONDITION of the foregoing obligation is such that in the cause lately pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, wherein the obligees were defendants and the obligor was plaintiff, the said obligees on the eighteenth day of July, [8] 1916, obtained judgment against the said obligor in the sum of Four Hundred Eighty-one Dollars and Fifty-five Cents ($481.55), with interest thereon at the rate of six per cent (6%) per annum from the said eighteenth day of July, 1916, and the said obligor has sought to obtain a writ of error in the said cause in the Supreme Court of the Territory of Hawaii, and that the said obligor has undertaken to pay the said judgment in the said cause, together with interest thereon, in case of failure to sustain the said writ of error.

NOW, THEREFORE, if the said obligor shall fail to sustain the said writ of error and shall fail to pay the said judgment in the said cause, together with interest thereon, then this obligation shall be of full force and effect; otherwise null and void.

CAROLINE J. ROBINSON,
Principal.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Surety.

By ARTHUR BERG,
Attorney in Fact.

JAMES M. MACCONEL,
Agent.

Approved as to form, sufficiency and amount.
ANDREWS & PITTMAN,
Atty. for Deft.

[Endorsed]: #465. No. 993. In the Supreme Court of the Territory of Hawaii. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Bond. Filed January 9, 1917, at 3:25 P. M. J. A. Thompson, Clerk. [9]

In the Supreme Court of the Territory of Hawaii.

($2.00 Stamps.)

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the County of Hawaii or his Deputy:

YOU ARE COMMANDED to summon Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, defendants-defendants in error, to appear before the Supreme Court of the Territory of Hawaii within twenty (20) days after service hereof, to answer the annexed petition for writ of error and assignment of errors of Caroline J. Robinson, plaintiff-plaintiff in error. And have you then there this Writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 9th day of January, 1917.

[Seal] J. A. THOMPSON,
Clerk. [10]

No. 993. Supreme Court, Territory of Hawaii, Caroline J. Robinson v. Lorrin A. Thurston and John D. Paris, Executors under the Will of Eliza Roy, Deceased. Summons. Issued at 3:45 o'clock P. M., January 9, 1917. J. A. Thompson, Clerk. Received at 10:45 P. M. Jan. 10, A. D. 1917. P. Gleason, Deputy High Sheriff. Ent. Returned at 1:45 o'clock P. M., January 29, 1917. J. A. Thompson, Clerk.

RETURN OF SERVICE.

Served the within Summons as follows:

On D. Paris, at Kaawaloa, District of ~~Kau~~, S. Kona County and Territory of Hawaii, this 25 day of January, A. D. 1917, by delivering to him personally a certified copy thereof and of the Petition for Writ of Error, Notice of Issuance of Writ of Error and Assignment of Errors annexed hereto, and at the same time showing him the original as directed.

Dated, Kau, Hawaii, this 25 day of January, A. D. 1917.

S. LAZARO,
Deputy Sheriff, South Kona.

RETURN OF SERVICE.

Served the within Summons as follows:

On Lorrin A. Thurston, at Volcano House, District of Kau, County and Territory of Hawaii, this 17th day of January, A. D. 1917, by delivering to him personally a certified copy thereof and of the petition for Writ of Error, Notice of Issuance of Writ of Error and Assignment of Errors annexed hereto, and at the same time showing him the original as directed.

Dated Hilo, Hawaii, this 7th day of January, A. D. 1917.

H. K. MARTIN,
Deputy Sheriff, County of Hawaii. **[11]**

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

($2.00 Stamps.)

CAROLINE J. ROBINSON,
Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants in Error.

Writ of Error.

The Territory of Hawaii: To Harry A. Wilder Esquire, Clerk Circuit Court, First Judicial Circuit.

WHEREAS, in an action lately pending before the Circuit Court of the First Judicial Circuit, in which the said Caroline J. Robinson was plaintiff, and the said Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, were defendants, error is alleged to have occurred as appears by the assignment of errors on file in this Court, you are commanded forthwith to send up to this Court the record and the exhibits filed in said proceedings.

WITNESS, the Hon. A. G. M. ROBERTSON, Chief Justice of the Supreme Court, at Honolulu, Territory of Hawaii, this 9th day of January, 1917.

By the Court:

[Seal] J. A. THOMPSON,
Clerk Supreme Court.

Received the above writ of error on this 10th day of January, 1917, at 9:00 o'clock A. M.

H. A. WILDER,
Clerk Circuit Court, First Circuit.

In obedience to the within writ to me directed, I herewith send up the record and all the exhibits filed in said above-mentioned cause.

H. A. WILDER,
Clerk Circuit Court, First Circuit.

Dated January 18, 1917. **[12]**

No. 993. Supreme Court, Territory of Hawaii. Caroline J. Robinson, Plaintiff in Error, v. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased. Defendant in Error. Writ of Error. Issued at 3:45 o'clock P. M. Jan'y 9, 1917. J. A. Thompson, Clerk. Returned at 2:50 o'clock P. M. Jan. 19, 1917. Robert Parker, Jr., Clerk.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Stamps $2.00.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY,

Defendants.

Complaint.

To the Honorable Presiding Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

Comes now Caroline J. Robinson, residing in the City and County of Honolulu, Territory of Hawaii, the plaintiff in the above-entitled cause, and complains of Lorrin A. Thurston, residing at said Honolulu, and John D. Paris, residing at Kealakekua, county and territory of Hawaii, the executors under the will of Eliza Roy, deceased, the defendants in the above-entitled cause, and for causes of action alleges:

FIRST COUNT.

(1) That one Eliza Roy, of Kona, said county and territory of Hawaii, died on or about the 29th day of August, 1912, leaving a last will and testament which was duly admitted to probate in the Circuit Court of the Third Circuit of the Territory of Hawaii, and that the said defendants are the duly

appointed, qualified and **[13]** acting executors under said Will.

(2) That heretofore, on or about the 23d day of September, 1884, one W. F. Roy, since deceased, made and delivered to Samuel C. Allen and Mark P. Robinson, his certain promissory note in writing, dated September 23d, 1884, for the sum of Two Thousand Dollars ($2,000.00), payable two years after the date of the said note, with interest thereon at the rate of ten per cent (10%) per annum until paid, payable semi-annually, a copy of which said promissory note, marked Exhibit "A," is hereto attached and made a part hereof; that thereafter said Eliza Roy, for valuable consideration, while the said promissory note still remained unpaid, promised and agreed with the holders of said promissory note to pay the same; that the said promissory note was duly assigned and transferred to the plaintiff herein and said plaintiff is now the owner and holder of said promissory note; that before the 23d day of March, 1889, the rate of interest of said promissory note was reduced from ten per cent (10%) to nine per cent (9%) per annum; that no part of the principal of said promissory note has been paid and no part of the interest thereon from the 23d day of March, 1889, has been paid, and the said principal and interest from the 23d day of March, 1889, has been paid, and the said principal and interest from the said 23d day of March, 1889, is now due and owing to the plaintiff.

(3) That heretofore, on or about the 31st day of July, 1886, the said Eliza Roy made and delivered

to one John N. Robinson her certain promissory note in writing, dated July 31st, 1886, for the sum of Three Thousand Seven Hundred and Fifty Dollars ($3,750.00), payable three years after the date of said note, with interest thereon at the rate of nine per cent **[14]** (9%) per annum, payable semi-annually, a copy of which said promissory note, marked Exhibit "B," is hereto attached and made a part hereof; that thereafter the said promissory note was duly assigned and transferred to said plaintiff and said plaintiff is now the owner and holder thereof: that the principal of said promissory note is entirely unpaid, and that no part of the interest thereon has been paid, save and except the sum of One Thousand and Thirty Dollars and Thirty Cents ($1,030.30), and that the same both principal and said interest, is now due and owing to the plaintiff and entirely unpaid.

(4) That heretofore, on or about the 23d day of July, 1895, the said W. F. Roy and Eliza Roy made and delivered to one Henry Holmes their certain promissory note in writing, dated July 23d, 1895, for the sum of One Hundred and Twenty-five Dollars ($125.00), payable on demand, a copy of which said promissory note, marked Exhibit "C," is hereto attached and made a part hereof; that thereafter the said promissory note was duly assigned and transferred to said plaintiff and said plaintiff is now the owner and holder thereof; that the principal of said promissory note is entirely unpaid and no interest has been paid thereon and that the same, both prin-

cipal and interest, at the legal rate, is due and owing to the plaintiff and entirely unpaid.

(5) That on or before the 27th day of November, 1905, at which time the said plaintiff was the owner and holder of all of said promissory notes hereinbefore referred to, and after the said Eliza Roy had agreed to pay the promissory note hereinbefore referred to as Exhibit "A," as hereinbefore alleged, the said plaintiff and said Eliza Roy entered into and executed an [15] *an* agreement in writing, a copy of which, marked Exhibit "D," is hereto attached and made a part hereof, wherein and whereby the said Eliza Roy acknowledged her indebtedness to said plaintiff upon and in respect of each and every said promissory notes hereinbefore mentioned, and said plaintiff, in consideration of ten dollars ($10.00), to her paid by said Eliza Roy and the covenants and agreements of Eliza Roy hereinafter mentioned, did release, cancel and discharge the said promissory notes upon the express condition that in case the said Eliza Roy should at any time thereafter mortgage or sell any of her real estate, or incur indebtedness amounting at any one time to the sum of One Thousand Dollars ($1,000.00), and upwards, without the consent in writing of said plaintiff, then and in such case the said release, cancellation and discharge should become null and void and of no effect, and said promissory notes, together with the interest thereon, should immediately become due and payable by said Eliza Roy, her executors and administrators to said plaintiff in the same manner as though said release, cancellation and

discharge had not been made; that in consideration of said release, cancellation and discharge, said Eliza Roy, for herself and her executors and administrators, covenanted and agreed with said plaintiff that she, said Eliza Roy, would not, without the approval in writing of said plaintiff, sell or mortgage any of her lands, or incur any indebtedness in excess at any one time, of the sum of One Thousand Dollars ($1,000.00), and did agree that in case of any such violation of said covenant and agreement or any part thereof, then and in such case the said promissory notes, together with interest thereon, should be and become immediately due and payable to said plaintiff, as if said release, concellation and discharge had not been made; that thereafter, between the 31st day of [16] July, 1908, or thereabouts, and the 8th day of June, 1909, or thereabouts, both dates inclusive, the said Eliza Roy did sell and convey certain portions of her real estate without the consent of the said plaintiff, and did thereafter, without the consent of said plaintiff, incur indebtedness amounting in the aggregate, at one time, to more than One Thousand Dollars ($1,000.00); that by the said sales and conveyances and the incurring of the said indebtedness, the said Eliza Roy did violate the condition of the said agreement and her said covenants and agreements therein contained, and by reason thereof the said promissory notes and each of them, together with the interest thereon, have become due and payable to the plaintiff and the same are now wholly due, owing and unpaid, save as hereinbefore alleged, to the said plaintiff;

(6) That on the 13th day of December, 1913, and within the period prescribed by law for the presentation of claims of creditors against the estate of said Eliza Roy, deceased, said plaintiff duly presented to said defendant as executors aforesaid, a duly authenticated claim under and in respect of the said promissory notes for the amounts due her thereunder, and that the same was rejected by said executors on the 4th day of ~~April,~~ March 1914.

(S) C.W.A., 1st Judge, June 1/16.

(7) That none of said promissory notes, either principal or interest, or any part thereof, have been paid, save and except interest paid as aforesaid, and the same are entirely due and owing and unpaid. [17]

SECOND COUNT.

(1) Said plaintiff reiterates and realleges all of the averments contained in paragraphs (1), (2), (5) and (6) of the First Count of this complaint, and alleges further:

(2) That no part of the principal of the said promissory note, copy of which marked Exhibit "A" is hereto attached, has been paid and no part of the interest thereon from the 23d day of March, 1889, has been paid, and the same is now and owing to the plaintiff.

THIRD COUNT.

(1) That said plaintiff reiterates and realleges all of the averments contained in paragraphs (1), (3), (5) and (6) of the First Count of this complaint, and alleges further:

(2) That no part of the principal of the said promissory note, copy of which marked Exhibit "B" is hereto attached, has been paid, and that no part of the interest thereon has been paid, save and except the sum of $1,030.30, paid on account of interest, and that the said principal and said interest, with the exception aforesaid, is now due and owing to the plaintiff.

FOURTH COUNT.

(1) The said plaintiff reiterates and realleges all of the averments contained in paragraphs (1), (4), (5) and (6) of the First Count of this complaint, and alleges further:

(2) That no part of the principal or interest of said promissory note, copy of which marked Exhibit "C" is hereto attached, has been paid, and the same is now due and owing to the plaintiff.

WHEREFORE plaintiff prays judgment against said defendants [18] in the sum of $5,875.00, being the aggregate amount of the principal sums of said promissory notes, together with interest thereon as provided therein from the respective dates of said promissory notes, less the amounts paid on account of interest as aforesaid, and for costs and attorneys fees, and that the process of this court to issue to cite said defendants to answer this complaint before a jury of the country at the 1914 term of this court unless sooner disposed of by judicial authority.

Dated, Honolulu, March 30, 1914.

(S.) CAROLINE J. ROBINSON,
Plaintiff.

(S. HOLMES, STANLEY & OLSON,
Attorneys for Plaintiff.

Territory of Hawaii,
City and County of Honolulu,—ss.

Caroline J. Robinson, being first duly sworn, deposes and says that she is the plaintiff in the above-entitled cause; that she has read the foregoing complaint and knows the contents thereof and that the same are true.

(S.) CAROLINE J. ROBINSON.

Subscribed and sworn to before me this 30th day of March, 1914.

[Seal] (S.) FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [19]

Exhibit "A" Attached to Complaint—Promissory Note Dated Honolulu, September 23, 1884, W. F. Roy to Samuel C. Allen and Mark P. Robinson.

$2000.00 Honolulu, Sept. 23d, 1884.

For value received two years after date I promise to pay to SAMUEL C. ALLEN and MARK P. ROBINSON, Trustees of the Estate of James Robinson, or order, the sum of TWO THOUSAND DOLLARS with interest at the rate of ten per cent (10%) per annum until paid, payable semi-annually.

W. F. ROY.

ENDORSEMENTS:

It is agreed that the Interest from March 23/1887 shall be at the rate of 9% per cent per annum.

M. P. ROBINSON,
For Trustees Est. Jas. Robinson.

$100.00. Honoulu May 2, 1885. Received six months Intr. to March 23, 1885.

$400.00. Honolulu, June 2, 1887. Received Twenty-Four months Intr. to March 23, 1887.

$180.00. Honolulu, June 19, 1888. Received 12 mos. Intr. to March 23, 1888. One hundred and eighty dollars.

$180.00 Honolulu, April 10th, 1889. Received 12 mos. Intr. to March 23, 1889. $180.00 Dollr.

M. P. ROBINSON,
For Trustees Est. Jas. Robinson. [20]

Exhibit "B" Attached to Complaint—Promissory Note Dated Kona, Hawaii, July 31, 1886, Eliza Roy to John N. Robinson.

$3750.00. Kona, Hawaii, July 31st, 1886.

For value received, three years after date I promise to pay to JOHN N. ROBINSON or order the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS, together with interest thereon payable semi-annually at the rate of nine per cent per annum free of taxes.

ELIZA ROY.

ENDORSEMENTS:

I hereby consent to this obligation hereby incurred by my wife.

W. F. ROY.

Hawaiian Islands,
Island of Hawaii,—ss.

On this 3d day of August, A. D. 1886, personally appeared before me W. F. Roy and Eliza, his wife, known to me to be the persons described in and who

executed the foregoing instrument, who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. The said Eliza being by me duly examined separate and apart from her husband declared to me that she executed the within instrument of her own free will and accord and without compulsion or fear of her husband.

J. W. SMITH,

Agent to Take Acknowledgments of Instruments
Kona, Hawaii.

1888, June 19. Recd. Int. 2 years to July 31, 1888. $675.

1888, June 19. Recd. Int. on a/c $55.30.

1889, Aug. 19. Recd. Int. on a/c $300. [21]

Exhibit "C" Attached to Complaint—Promissory Note Dated Honolulu, July 23, 1895, W. F. Roy and E. Roy to Henry Holmes.

$125.00 Honolulu, July 23d, 1895.

On demand after I date, I promise to pay to the order of HENRY HOLMES, ONE HUNDRED AND FIFTY FIVE /00 DOLLARS, in U. S. Gold Coin at the Bank of Bishop & Co.

Value received.

W. F. ROY and E. ROY.

ENDORSEMENT:

Pay to Mrs. Caroline J. Robinson or order without recourse.

HENRY HOLMES. [22]

Exhibit "D" Attached to Complaint — Release Dated November 27, Between Caroline J. Robinson and Mrs. Eliza Roy.

THIS AGREEMENT made this twenty-seventh day of November by and between CAROLINE J. ROBINSON of Honolulu, Territory of Hawaii, and MRS. ELIZA ROY, widow of W. F. Roy of Kona, Island of Hawaii,

WITNESSETH:

WHEREAS the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums:

1.—On Promissory Note of W. F. Roy and Eliza Roy dated July 23, 1895, with interest at the rate of 8% per annum	$125.00
Amount of interest to date.....	103.33
2.—On Promissory Note signed by W. F. Roy dated Sept. 23, 1884, and assumed by said Eliza Roy, with interest at the rate of 9% per annum from March 23, 1889.....	2000.00
Amount of interest to date.....	3000.00
The same being secured by mortgage of real estate dated Sept. 23, 1884, and recorded in the Registry of Deeds in Honolulu, in Book 91 on pages 411–413.	
3.—On Note of Eliza Roy dated July 31, 1886, with interest at the rate of 9% per annum from July 31, 1889, the same being secured by mortgage of real estate dated July 31, 1886, re-	

corded in the Registry of Deeds in said Honolulu in Book 99, on pages 488–489 ..... 3750.00
Amount of interest to date..... 5512.50

Total amount of principal and interest as of November 23, 1905.....$14490.83

AND WHEREAS the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claim under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions;

NOW THEREFORE in consideration of the premises and of the sum of Ten Dollars ($10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Robinson doth hereby acknowledge [23] full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

PROVIDED, HOWEVER, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars ($1,000) and upwards without the consent in writing of the said Caroline J. Robinson, then

and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgement of payment and release of said notes and mortgages had not been made.

The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, executors, administrators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess, at any one time, of the sum of One Thousand Dollars ($1,000).

And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtedness and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Rob-

inson, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgement of payment and release has not been made.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Sgd.) CAROLINE J. ROBINSON.

her

ELIZA ROY. X

mark

Witness:

(Sgd.) L. A. THURSTON.

[Endorsed]: Filed Mar. 30, 1914 at 4:25 a'clock P. M. (S.) J. A. Dominis, Clerk. **[24]**

In the Circuit Court of the First Circuit, Territory of Hawaii.

A. D. 1914 TERM.

(Stamps $2.00.)

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants.

Term Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu, or his Deputy, or any Police Officer:

YOU ARE COMMANDED to summon LORRIN A. THURSTON and JOHN D. PARIS, Executors under the Will of Eliza Roy, deceased, defendants, in case they shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next term thereof, to wit, the A. D. 1915, Term thereof, to be holden at Honolulu, City and County of Honolulu, on Monday the 11th day of January next, at 10 o'clock A. M., to show cause why the claim of the above named plaintiff should not be awarded to her pursuant to the tenor of her annexed Complaint.

And have you then there this Writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit at Honolulu aforesaid, this 30th day of March, 1914.

[Seal] (S) J. A. DOMINIS,
Clerk.

L. No. 7950. Reg. 4, p. 416. Circuit Court, First Circuit. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under

the Will of Eliza Roy, Deceased, Defendants. Term Summons. Issued at 4:25 o'clock P. M. Mar. 30th, 1914. (S.) J. A. Dominis, Clerk. Returned at 1:25 o'clock P. M. April 6th, 1914. (S.) J. A. Dominis, Clerk. [25]

Territory of Hawaii,
County of Hawaii,—ss.

I, Manase K. Makekau, Deputy High Sheriff of the Territory of Hawaii, do hereby certify and make return that I served the within Summons, Complaint and Exhibits "A," "B," "C," and "D" as follows:

On John D. Paris, executor under the will of Eliza Roy, deceased, therein named as defendant, at Kealakekua, South Kona, County and Territory of Hawaii, this 1st day of April, A. D. 1914;

On Lorrin A. Thurston, executor under the will of Eliza Roy, deceased, therein named as defendant, at Waiakea, Hilo County and Territory of Hawaii, this 2d day of April, A. D. 1914;

By delivering to each of them a certified copy hereof and of the Complaint and Exhibits "A," "B," "C" and "D," annexed hereto, and at the same time showing each of them the original as herein directed.

Dated Hilo, County of Hawaii, April 2d, 1914.

(S.) M. K. MAKEKAU,
Deputy High Sheriff, Territory of Hawaii. [26]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants.

Answer.

Now come the defendants, by their attorney, Lorrin Andrews, and, answering the complaint of the plaintiff herein, deny each and every allegation in said complaint contained.

And, further, defendants give notice that, among other defenses, they will rely upon the defense of payment, the statutes of frauds and the statute of limitations.

(S.) LORRIN ANDREWS,
Attorney for Defendants.

Dated Honolulu, T. H., April 27, 1914.

[Endorsed]: L. No. 7950. Reg. 4, pg. 416. Circuit Court, First Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston et al., as Executors, etc., Defendants. Answer. Filed April 27, 1914, at 40 minutes past 10 o'clock A. M. (S.) J. A. Dominis, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Defendants.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants.

Amended Answer.

Now come the defendants, by their attorney, Lorrin Andrews, and answering the complaint of the plaintiff herein, admit paragraphs 1, 2, 3 and 4 of the First, ~~Second and Third~~ Counts in said complaint contained, and deny each and every other allegation in said complaint contained, and further answering said complaint, allege that any and all claims now held by the said plaintiff against the said Eliza Roy were fully paid and settled by the agreement dated the 28th day of November, 1905, attached to said complaint and marked Exhibit "D," and further set up that more than six years have elapsed since said notes and indebtedness now held by said plaintiff became due and payable, ~~and more than ten years have elapsed since said mortgages set forth in said complaint became due and payable,~~ and that all of said claims set forth in said complaint are now barred by the statutes of the Territory of Hawaii in regard to the limitation of actions. [28]

(S) C. W. A., 1st Judge, June 1/16.

(S) C. W. A., 1st Judge, June 1/16.

WHEREFORE, defendants demand judgment that plaintiff's complaint be dismissed, with costs.

Dated, Honolulu, T. H., May 24, 1916.

_____,

Attorney for Defendants.

[Endorsed]: L. No. 7950. Reg. 5, pg. 416. L. No. 7950. Circuit Court, First Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Amended Answer. Filed May 24th, 1916, at —— minutes past 3 o'clock P. M. (S.) J. A. Dominis, Clerk. Lorrin Andrews, Honolulu, T. H., Attorney for Defendants.

Plaintiff herein hereby consents to the filing of the within Answer.

CAROLINE J. ROBINSON,
Plaintiff,
By (S.) HOLMES & OLSON,
Her Attorneys. [29]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants.

Opinion and Decision.

The declaration herein alleges in substance as follows: That the defendants are the regularly appointed, qualified and acting executors of the last will and testament of Eliza Roy, deceased, formerly of Kona, in the Island of Hawaii. That about September, 1884, one W. F. Roy, since deceased (then the husband of said Eliza Roy), executed to the trustees of the estate of James Robinson, his promissory note for $2,000.00, payable two years after its date, with interest at ten per cent (10%) per annum until paid, and payable semi-annually, and that thereafter, said Eliza Roy, for a valuable consideration, assumed the payment of said note. That said promissory note has been duly assigned to, and is now owned by the plaintiff herein, and that the entire principal of said note, together with interest (which in the interval had been reduced to nine (9%) per cent per annum), from March 23d, 1889, is now due and payable. That on or about July 31st, 1886, said Eliza Roy executed her promissory note for $3,750.00 to John N. Robinson, [30] payable three years after said date, with interest at nine (9%) per cent per annum, payable semi-annually; that plaintiff has since acquired and now owns said note, and that the entire principal thereby represented, together with interest at said rate, is now due and owing, except as to the sum of $1,030.30, which has been paid on account of interest thereon. That on or about July 23d, 1895, said W. F. Roy and Eliza Roy, executed to Henry Holmes, their promissory

note in the sum of $125.00, payable on demand, which said note has since been acquired and is now owned by plaintiff, and has not been paid. There is no allegation of any demand for the payment of this note having been made upon either of its makers, except as such demand may possibly be implied from a certain agreement between plaintiff and said Eliza Roy, hereinafter referred to.

The agreement just mentioned is alleged to have been executed November 27th, 1905, and is of such peculiar character as to call for the recital *in haec verba,* of the greater part of its contents. After reciting an indebtedness by Eliza Roy to the plaintiff, in respect of the promissory notes above mentioned, to an aggregate of $14,490.83,—said agreement proceeds as follows:

> "AND WHEREAS, the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claim under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions;
>
> "NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars ($10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged, and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Rob-

inson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

"PROVIDED, HOWEVER, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars ($1,000) and upwards, without the consent in writing of the said Caroline J. Robinson, then and in any such case this ackowledgment of payment of said indebtedness [31] and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made.

"The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, executors, administrators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of

the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess, at any one time, of the sum of One Thousand Dollars ($1,000).

"And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtdness and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson, and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Robinson, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgment of payment and release had not been made."

There are other counts to the declaration, declaring upon said promissory notes separately. It is to to be observed that there is no mention in the body of the declaration of any security having been given for the payment of said notes, or any of them; but in the agreement above referred to and quoted from, it is recited that the earliest of said promissory notes, that for $2,000.00, executed by W. F. Roy to the trustees of the estate of James Robinson, was secured by mortgage of real estate, bearing even date therewith, which mortgage was duly recorded, etc.

The declaration further alleges that plaintiff made due presentation to the defendants, as such executors, of her claim in this behalf, within the time

limited by law, and that they having rejected the same, plaintiff filed this suit within the period permitted by law after such rejection. [32]

The amended answer of the defendants admits all of the allegations of the complaint which have to do with the execution, delivery, transfer, present ownership, and nonpayment (except as hereinafter noted), of the promissory notes in question, but denies all the other allegations thereof, and alleges "that any and all claims now held by the said plaintiff against the said Eliza Roy, were fully paid and settled by the agreement dated the 27th day of November, 1905, attached to said complaint and marked Exhibit "D," and further set up that more than six years have elapsed since said notes and the indebtedness now held by said plaintiff became due and payable, and that all of said claims set forth in said complaint are now barred by the statutes of the Territory of Hawaii in regard to the limitation of actions."

It is thus seen that all the substantial facts averred in the declaration are admitted, but the amended answer denies the effect, or legal conclusions claimed for those facts, as attempted to be established in behalf of plaintiff by virtue of the agreement of November 27th, 1905, and insists, moreover, that one effect of said agreement was the complete payment, release and discharge of the formerly existing obligations represented by the promissory notes in question, and that the remedy of plaintiff upon each of said notes is barred by the statute of limitations.

There can be no doubt, when the agreement in

question was executed, November 27th, 1905 (for aught that appears to the contrary in the declaration), the statute of limitations had run upon each of said demands, and Mrs. Roy then had an adequate legal defense against each and every one of them. But plaintiff insists that, by virtue of the agreement in question, there was a "new promise" on the part of Mrs. Roy to pay the notes, in a certain contingency, namely, the alternative contingency that Mrs. Roy should, [33] without the written consent of the plaintiff, "sell any of her real estate or incur indebtedness amounting at any one time to the sum of One Thousand Dollars ($1,000) and upwards." And it is upon the basis of an alleged breach of each of said alternatives by Mrs. Roy that plaintiff now claims the right to recover. In this behalf evidence was introduced, over the objection of defendants, to the effect that after the execution of said agreement, and while it was in force, Mrs. Roy not only incurred indebtedness exceeding, in the aggregate, One Thousand Dollars ($1,000.00),—but also that she made several conveyances of small portions of her land estate in Kona to her son, William F. Roy. And plaintiff's claim herein includes the feature that, by each such violation of the terms of the agreement, Mrs. Roy was remitted to her original obligation to pay the notes in question, both principal and interest.

I find, as facts, that Mrs. Roy did make such conveyances, but I also find that, prior to Mrs. Roy's death, the plaintiff assented to, and ratified said conveyances, and as matter of law, I find that by such consent and ratification, plaintiff excluded herself

from the right to thereafter complain of said conveyances, or, because of such conveyances, to resort to the enforcement of the payment of said notes, or any of them. With respect to the incurring of indebtedness by Mrs. Roy, I find as a fact that she did incur such indebtedness, after the execution of said agreement, to an aggregate of more than One Thousand Dollars at a time, but, for reasons to be hereinafter discussed, I find that said fact did not deprive her of the benefit of the release and discharge of said indebtedness expressed in said agreement.

It is to be noted, with reference to the $2,000 note, its payment purported to be secured by a mortgage, recited in said [34] agreement, but not alluded to in the body of the declaration. Whatever might be the standing of plaintiff in a court of equity, should she now bring suit to foreclose said mortgage, (as to which I express no opinion), it is to be observed that the present is a suit in assumpsit, wherein she sues upon the promissory notes, ignoring the mortgage security given for the payment of one of them. We must therefore consider this matter as though no mortgage had in fact been given.

Said agreement, after a recital of the execution and nonpayment of the notes in question, and of the mortgage mentioned, proceeds to state that the plaintiff, in consideration of the premises, and of the sum of Ten Dollars ($10), paid to plaintiff by Mrs. Roy, and in further consideration of the covenants and agreements of Mrs. Roy contained in said agreement,—"doth hereby acknowledge full payment and settlement of said indebtedness, principal and inter-

est, hereinabove set forth, and doth hereby release the same, and cancel and discharge the said notes and mortgages.'' It would be difficult to conceive of phrases in the English language more pertinent and potent to express and effect a total release and discharge of the notes and mortgage in question. The consideration for said release is recited, and was and is a valuable and valid consideration, and the release itself is executed under seal, a feature to which the decisions of courts have, in the past, attached a peculiar significance,—for it is familiar law that an obligation which has once been released and discharged, especially when so released and discharged by instrument under seal, can never thereafter be revived. It is utterly and absolutely dead, and can have no further existence as a legal obligation. Thus, in Tyson v. Dorr, VI Whart. (Pa.) 255, 262–3, the Court said: [35]

> ''In Agnew v. Dorr, V. Whart. 131, the assignment required a full and complete release by the creditors. A condition inserted in his release by a creditor, that he should receive twenty-five per cent of his debt was held to be bad, as not in compliance with the terms of the assignment, and as throwing on the assignees difficulties and embarrassments incompatible with the execution of their trust. But in that case there was no release executed; there was merely a letter written by the creditor, agreeing to become a party to the assignment and release, on condition of the fund paying twenty-five per cent of his claim. This was held to be in its nature merely an ex-

ecutory agreement which could not be enforced without a consideration, and as the creditor could not come upon the fund, his agreement to release would not be enforced. In the present case there is not merely an executory agreement, but a technical release, executed under hand and seal; and the result is different. For, as is said in Agnew v. Dorr, it is certain that a technical release will discharge a duty at law, without consideration, and that chancery will not relieve against it, where the releasor has acted with full knowledge of all necessary circumstances. The release, therefore, is, in the present case, clearly binding.

"If, then, the release be binding, and the condition inoperative, by reason of its repugnancy to the terms of the assignment, and the impossibility that it should be performed, the consequence is, that the release remains single and absolute, and extinguishes the debt. For the principle of law has long been settled, that if one gives an obligation, with condition to be void on the performance of that which is impossible at the time of its execution, the bond is single, and it is the same as if there were no condition at all. . . .

"Now, the condition of this release is, that the assignment pays over twenty-five per cent of the claim. But this could never be; for the assignees could not divert the funds from their appropriate channel, which was first to the preferred creditors; next amongst those who ex-

ecuted perfect releases; and lastly, to the assignors. Under no possible circumstances could the assignment pay the releasors anything whatever, if they did not release according to the terms of the assignment; nor could the assignees voluntarily pay any portions, without a breach of their trust, which the law will not suppose beforehand, nor recognize when done as valid in its operation.

"Again, a man cannot release a personal action as an obligation, with a condition subsequent, but the condition will be void; for a personal action once suspended, is extinguished forever: 1 Rol. Ab. 412. For instance, a release, if once operative, cannot be avoided; so that one may make a release to operate on a contingency, but cannot make a release to be void on a condition: 1 Inst. 274, b. A thing once extinguished cannot be revived; or, in other words, if the release be on a condition subsequent, the release is good, and the condition void; 2 Shep. Touch. by Preston, 325; Law Lib. 91st Part, 154. The present is not an instrument by which on a future contingency the release is to become operative: but a release first with a condition which is intended to defeat it subsequently, if the releasor should not receive twenty-five per cent, and the release remains binding, though such condition be never performed." [36]

"A release by its own operation extinguishes a pre-existing right, and cannot be controlled or explained by parole. A release, therefore,

should be held to include all demands embraced by its terms, whether particularly contemplated or not."

Sherburne v. Goodwin, 44 N. H. 271–277.

"According to Pothier, there are two kinds of release—one called a real release, and the other a personal discharge. A real release is where the creditor declares that he considers the debt as acquitted. It is equivalent to a payment, and renders the thing no longer due, and consequently it liberates all the debtors of it, as there can be no debtors without something due. A personal release merely discharges the debtor from his obligation and extinguishes the debt indirectly where the debtor to whom it is granted was the sole principal, because there can be no debt without a debtor. . . . It only liberates the person to whom it is given."

Booth v. Kinney, 8 Gratt. 560, 568 (citing Pothier, p. 111, c. 3, Art. 2, §§ 1, 11).

"A release is a discharge of a debt by the act of the party, in distinction from an extinguishment, which is a discharge by operation of law."

Baker v. Baker, 28 N. J. Law, 13, 20; 75 Am. Dec. 243.

"The word 'release' when not interpreted by the context has a technical meaning which presupposes a seal; but it is also an apt word to express the general idea of discharge or deliverance. So it is held that a requirement in an assignment for the benefit of creditors that they execute releases, was intended to secure the ab-

solute discharge of the debtor as to creditors coming in under the assignment," and hence any instrument which is sufficient for that purpose was a compliance.

Burgiss v. Westmoreland, 33 So. Car. 425; 17 S. E. 56.

"A release may be under seal, or may not; but, if it has a seal, the same imports consideration."

Winter v. Kansas City Cable Ry. Co., 73 Mo. App. 173, 187.

The language of the agreement in question is so full, explicit, precise and comprehensive, as to leave the court in no doubt as to the intent of the parties to that instrument, wherein the present plaintiff "doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove [37] set forth, and doth hereby release the same and cancel and discharge the said notes and mortgage."

Should we view this transaction from the standpoint of an accord and satisfaction, the same results would follow. The plaintiff and her mother, Mrs. Roy, in and by said agreement, came to an "accord," concerning the previous execution of the obligations in question, and of their then existence; and, they also came to a "satisfaction" of said obligations, as evidenced by the language above quoted from the document itself. Again, it is familiar law that an accord and satisfaction wipes out and discharges the obligations in respect of which the accord and satisfaction are arrived at. Such a transaction usually includes a new or an additional contract or agree-

ment; that is, that the creditor shall accept some lesser sum, or some different character of payment or of service from the debtor, than the sum or service provided for in the original contract. And so, in the case at bar, if we view this transaction as an accord and satisfaction, we find that whereas Mrs. Roy acknowledged the existence of certain obligations of hers to her daughter, the present plaintiff, she, Mrs. Roy, made a new agreement with her daughter to the effect that the daughter should, and did release and discharge all of the obligations as theretofore existing, and, in consideration thereof accepted from her mother the sum of Ten Dollars, together with a new and further agreement that the mother should not thereafter, without the written consent of the daughter, incur financial indebtedness to an aggregate exceeding One Thousand Dollars, or make conveyance of any of her land.

It is now established that Mrs. Roy violated both features of that agreement, but, as to one of said features, the plaintiff by [38] her ratification thereof, has estopped herself to complain of it. As to the other of said features, namely, the incurring of indebtedness, plaintiff now insists that the legal effect of said violation was to revive, reanimate, and inspire with new life, vitality and validity, all of the monetary obligations of Mrs. Roy to her daughter which had, in and by said agreement, been so solemnly acknowledged to have been paid, and to be released and discharged. And plaintiff's counsel has cited a number of authorities in support of this proposition. I have examined said authorities, and

find that they do not by any means support the contention to which they are cited. One case (of my own discovery), I will first consider. It is that of Byrd Printing Co. v. Whitaker Paper Co., 135 Ga. 865; 70 S. E. 798; 22 Ann. Cases (1912A), 182. In that case, as in the present, there had been a transaction which the Court construed as an accord and satisfaction. As a part of the new agreement the Byrd Printing Co. had given its check to the other party for a considerable amount. Some further friction having arisen between the parties before the presentation of the check for payment, its payment had been stopped by the maker, and the suit in question was brought to collect the amount of the check. The Byrd Company (maker of the check) claimed immunity upon the ground that the Whitaker Company had violated the new agreement, and claimed that, because of such violation the parties were thereby remitted to their former status, as existing between the date of the accord and satisfaction, but the Supreme Court of Georgia, in repudiating this doctrine, used the following language:

> "The mere breach of the contract or a declared intention of one of the parties not to abide by it, would not of itself operate to restore the status of the parties as it existed prior to the execution of the contract."

And so, in the case at bar, the mere breach by Mrs. Roy, of the contract expressed in the document of November 27th, 1915, did [39] not restore the parties to their former status, or clothe plaintiff with

a right to recover upon the promissory notes in question. It is conceivable, (but as to this point I express no opinion), that plaintiff might have maintained against her mother an action for damages for the breach of the contract in question, and might have recovered such damages as she should have shown herself to have suffered by reason of such breach. But the action now at bar must be carefully distinguished from any such action as is herein supposed. This present suit is based solely upon the assumption that Mrs. Roy's breach of the agreement of 1905, restored the former status of the parties with reference to the rights and obligations involved in the promissory notes in question. That assumption, in my opinion, is not well founded, and cannot prevail.

The citations of plaintiff's counsel include a number of cases cited in Wald's Pollock on Contracts (3d Ed.), p. 814, upon the topic of conditional releases. I quote from the text as follows:

> "A release may be subject to the happening of a condition precedent. And it has been held that it may also be subject to a condition subsequent."
>
> Citing Slater v. Jones, L. R. 8 Exch. 186; Newington v. Levi, L. R. 5 C. P. 607, and, on appeal, L. R. 6 C. P. 180.

Those cases had to do with a construction of the English Bankruptcy Act, and although different members of the two courts before whom they came gave expression to *obiter dicta* to the effect that a release may be subject to a condition subsequent to the

extent that a breach of the agreement or condition upon which the release is executed may restore the former status of the parties, yet [40] it is to be observed that no such question was involved in either of the cases cited, and no actual decision to that effect was made in either case. Several of the Judges referred to, in the course of their opinions, mentioned the case of Ford v. Beech, 11 Q. B. 852, 867, wherein the doctrine was laid down that—"The right to bring a personal action once existing, and, by the act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive."

There is no lack of further authorities upon the general subject of the effect of a release, once executed, upon sufficient consideration. Thus, in Allen v. Ruland, 79 Conn. 411–412, 118 Am. St. Rep. 146, 150, which was an action for false imprisonment, a release of one or more of the alleged trespassers was pleaded in bar of the action. The Court said: "Each release was in its nature the final embodiment in written words of the agreement of the parties. Its dominant purpose was not to acknowledge the receipt of certain moneys or articles of property, but to state something done in consideration of their receipt. A receipt is evidence that an obligation has been discharged, but a release is itself a discharge of it. A discharge is a fact, which cannot be explained away, as against any one whose interests may have been affected by it."

And the Supreme Court of the United States, in

discussing the effect of a release, has used the following language,—

> "The release being once regularly executed and delivered could not afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given."
>
> Fitzsimmons v. Ogden, 7 Cranch 1, 2, 19; 3 Law Ed. 255.

And the Supreme Court of Illinois, in Kingsley v. Kingsley, 20 Ill. 203, 208, in discussing the effect of a release that had been prematurely signed and delivered, before certain of the incidents [41] therein contemplated had been performed, cites the foregoing case of Fitzsimmons v. Ogden with approval, and uses the following language:

> "The release was executed on the delivery of the notes, and there is no fraud shown, either in its execution or delivery. The most that can be said is, that complainant did not perform his contract; but that does not render the release ineffectual. The release being once fairly and regularly executed and delivered, could never afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given. It could go no further than to charge the complainant with a breach of contract, for which he would be liable."

The result of the authorities, applied to the facts admitted and found herein, must, in my opinion, be

a judgment in favor of the defendants, for their costs in this cause. And it is so ordered.

Dated this 10th day of July, 1916.

[Seal] (S.) C. W. ASHFORD,
First Judge.

[Endorsed]: Law No. 7950. Reg. 4, p. 416. Circuit Court, First Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Opinion and Decision. Filed at 9:30 o'clock A. M. July 10th, 1916. (S.) J. C. Cullen, Clerk. [42]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants.

Plaintiff's Exceptions.

Comes now Caroline J. Robinson, plaintiff in the above-entitled cause, by her attorneys, Holmes & Olson, and does hereby except to the decision filed in the said cause by the Honorable C. W. Ashford on the 10th day of July, 1916.

Dated, Honolulu, T. H., July 11th, 1916.

(S.) HOLMES and OLSON,
Attorneys for Plaintiff.

[Endorsed]: L. No. 7950. Reg. 4, Pg. 416. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Plaintiff's Exceptions. Filed at 3:40 o'clock P. M. July 11th, 1916. (S.) J. A. Dominis, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Plaintiff. [43]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants.

Judgment.

This cause coming on regularly for trial on the 1st day of June, 1916, before the court, without a jury, a jury having been expressly waived, Holmes and Olson, appearing as attorneys for the plaintiff, and Andrews & Pittman, appearing as attorneys for the defendants, oral and documentary evidence was introduced on behalf of the plaintiff and defendants,

and the same having been closed, the court files its findings and decisions in writing, and orders judgment in favor of the defendants.

WHEREFORE, by reason of the law and the findings aforesaid, it is by the court hereby ordered, adjudged, and decreed, that plaintiff take nothing by her action herein against the defendants, or either of them, and that the defendants do have and recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of $481.55.

Judgment entered this 18th day of July, 1916.

By the Court:

(S.) J. A. DOMINIS,
Clerk.

[Endorsed]: L. No. 7950. Reg. 4, pg. 416. In the Circuit Court of the First Judicial District, Territory of Hawaii. Caroline J. Robinson, Plaintiff, vs. Lorrin A. Thurston, and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Judgment. Filed at 9:40 o'clock A. M. July 18th, 1916. (S.) J. A. Dominis, Clerk. Andrews & Pittman, Attorneys for Defendant. **[44]**

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants.

Exception.

(S.) H. & O.

Plaintiff hereby excepts to the judgment entered in the above-entitled cause on the 18th day of July, 1916, adjudging that plaintiff's complaint be dismissed, that plaintiff take nothing by her said action against the defendants, or either of them, and that defendants do have and recover of and from the plaintiff their costs and disbursements incurred in said cause, on the ground that the same is contrary to law.

Dated Honolulu, T. H., August 1st, 1916.

(S.) HOLMES and OLSON,
Attorneys for Plaintiff.

The above exception is hereby allowed.

Aug. 1st, 1916.

(S.) C. W. ASHFORD,
First Judge, Circuit Court, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. 7950. Reg. 4, pg. 416. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Caroline J. Robinson, Plaintiff. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants. Exception. Filed at 10 o'clock A. M. August 1, 1916. (S.) Henry Smith, Clerk. Holmes & Olson, 863 Kaahumanu St., Honolulu, Attorneys for Plaintiff. [45]

Minutes of the Clerk of the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

THURSDAY, JUNE 1st, 1916.

AT TERM—2 O'CLOCK P. M.

Present: Hon. C. W. ASHFORD, First Judge Presiding.
H. K. ASHFORD, Clerk.
J. L. HORNER, Reporter.

L. 7950.

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants.

ASSUMPSIT.

C. H. OLSON, Esq. (HOLMES & OLSON), Counsel for the Plaintiff.

Messrs. ANDREWS & PITTMAN, Counsel for the Defendants.

TRIAL—JURY WAIVED.

Counsel for both parties appeared in court, and on behalf of their respective clients, waived trial by jury herein.

Counsel for the plaintiff thereupon read the Complaint herein, and, during the reading of said complaint was permitted to amend the date therein set

forth as the "9th day of April," to read the "4th day of April," 1916. At the close of the reading of the complaint, Mr. Andrews, of counsel for the defendants, read the amended answer, as amended by striking out certain words by agreement of counsel in open court. Said answer admitting the allegations of paragraphs 1, 2, 3 and 4 of the first count, and the same paragraphs as relative to the other counts with regard to the execution of the notes in question.

Mr. Olson then offered in evidence a certain Agreement dated November 27th, 1905, between Caroline J. Robinson and Eliza Roy, [46] a copy of which said agreement had been attached to the complaint as Exhibit "D" of said complaint.

Counsel for the defendants admitted the said agreement to have been executed on the above date, whereupon, by consent, the original agreement was received in evidence, and marked Plaintiff's Exhibit "B." Counsel for the defendants at the request of counsel for the plaintiff, admitted that at the time Exhibit "A" was executed, the plaintiff was the owner and holder of the promissory notes mentioned in the complaint.

Counsel for the plaintiff offered in evidence the transcript of the testimony of Thomas C. White, Esq., taken before the Hon. T. B. Stuart, 3d Judge of this court. The said transcript, together with the exhibit therein referred to, was, by consent of counsel, received in evidence and the whole marked collectively Plaintiff's Exhibit "A."

Counsel for both sides thereupon made certain admissions which are set forth in full in the Reporter's Notes, dealing with the amounts of money which Mrs. Roy was asserted to have been indebted to outside parties; with the fact that the claim of the plaintiff on behalf of these notes, had been made upon the executors within the time prescribed by law, and certain other admissions with regard to the payment of interest on the said notes.

At 3:07 P. M. the Court took a recess.

At 3:15 P. M. the Court resumed, whereupon the plaintiff rested, it being understood between the parties that the defendants should be permitted to later file certain deeds made by Mrs. Eliza Roy to Mrs. Thomas C. White and Mrs. Allan Wall.

The defendants then called (1) Caroline J. Robinson, sworn and testified.

At 3:34 P. M. the defendants rested, whereupon it was again [47] stipulated that the defendants should have permission to file certified copies of the deeds made by Eliza Roy to Mrs. Thomas C. White and Mrs. Allan Wall, subsequent to the agreement previously introduced and received in evidence as Exhibit "B"; or, at their option, to produce in court the books of record from the Registrar's Office in which said deeds have been recorded.

At 3:35 P. M., Mr. Olson, argued the case on behalf of the plaintiff.

At 4 P. M., Mr. Pittman on behalf of the defendants, argued on behalf of the defendants, and was followed at 4:20 P. M. by Mr. Andrews, who continued the argument in favor of the defendants.

At 4:30 P. M. the Court continued further hearing in this cause until 2 o'clock P. M. to-morrow, June 2d, 1916, and adjourned to 9 o'clock A. M. to-morrow, June 2d, 1916.

By Order of the Court:

(S.) J. C. CULLEN,
Clerk. [48]

FRIDAY, JUNE 2d, 1916.

AT TERM—2 O'CLOCK P. M.

Present: Hon. C. W. ASHFORD, First Judge Presiding.
H. K. ASHFORD, Clerk.
J. L. HORNER, Reporter.

L. 7950.

CAROLINE J. ROBINSON,
Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants.

ASSUMPSIT.

C. H. OLSON, Esq. (HOLMES & OLSON), Counsel for the Plaintiff.
Messrs. ANDREWS & PITTMAN, Counsel for the Defendants.

TRIAL—JURY WAIVED, FROM YESTERDAY.

Upon the opening of court, Mr. Andrews, of counsel for the defendants, by agreement, was permitted

to reopen the case for the defendants for the purpose of offering in evidence certain deeds from Mrs. Eliza Roy to W. F. Roy, Mrs. Allan Wall and Mrs. Thomas C. White, and for this purpose called (2) James K. Ahloy, sworn and testified.

Mr. Ahloy on being called to the stand, produced the Registry Books in which the said deeds were recorded, and read the deeds in question into the record with the exception of the descriptions. Said deeds being read from Liber 310, page 5; Liber 317, page 151; Liber 355, page 283; Liber 371, page 9.

The defendants then called (3) John D. Paris, sworn and testified.

At 2:34 P. M. the defendants rested, whereupon the plaintiff immediately did the like.

Counsel for the plaintiff having previously argued his case in chief to the Court,—Mr. Andrews for the defendants, argued the matter on behalf of his clients, and, at the close of Mr. [49] Andrews' argument, Mr. Olson, for the plaintiff, closed the case.

At 3:20 o'clock P. M. the *Court the* matter under advisement, promising a written decision as soon as possible,—and adjourned to Saturday, June 3d, 1916, at 10 A. M.

By Order of the Court:

(S.) J. C. CULLEN,

Clerk. [50]

MONDAY, JULY 10th, 1916.

L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants.

ASSUMPSIT.

HOLMES & OLSON, Counsel for the Plaintiff.
ANDREWS & PITTMAN, Counsel for the Defendants.

At 9:30 o'clock A. M. this day, the Court filed its written opinion and decision in this cause, finding in favor of the defendants.

By Order of the Court:

(S.) J. C. CULLEN,

Clerk. [51]

TUESDAY, JULY 18th, 1916.

AT TERM.

L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants.

ASSUMPSIT.

Messrs. HOLMES & OLSON, Counsel for the Plaintiff.

Messrs. ANDREWS & PITTMAN, Counsel for the Defendants.

The bill of costs of the defendants in the sum of $481.55, having been O. K.'d by counsel for the plaintiff herein, was this day allowed by the Court in the above sum, and duly filed.

By Order of the Court:

(S.) J. C. CULLEN,
Clerk. [52]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON et al.,

Defendants.

Testimony.

June 1st, 1916.

(Complaint read.)

The COURT.—By the way, gentlemen, I understand there is a demand for a jury trial.

Mr. OLSON.—We waived that.

Mr. ANDREWS.—Both of us, in open court.

Mr. OLSON.—That was waived in open court.

The COURT.—Well, who accepted the waiver?

Mr. OLSON.—Mr. Stuart.

The COURT.—Well, that might do for Judge Stuart, but I don't feel very much disposed to try the facts—

Mr. OLSON.—Well, if your Honor please, the facts,—there are no facts really to be—to try, your Honor.

Mr. ANDREWS.—No, it is a question of law.

Mr. OLSON.—Purely and simply.

The COURT.—Very well.

Mr. OLSON.—I now offer in evidence an agreement made the date of the 27th day of November of 1905.

The COURT.—Is that one of the exhibits, the original of one of the exhibits.

Mr. ANDREWS.—The original Exhibit "D," your Honor. [53]

Mr. OLSON.—While the year is not stated specifically—an agreement between Caroline J. Robinson and Mrs. Eliza Roy, widow of W. F. Roy of Kona, Island of Hawaii, being the document referred to in the complaint as Exhibit "D."

Mr. ANDREWS.—No objection.

Mr. OLSON.—You will admit, will you, Mr. Andrews, that the—this is the—this agreement was executed by the parties purporting to execute it, namely, Caroline J. Robinson and Eliza Roy, rather signed by her mark?

Mr. ANDREWS.—Yes.

The COURT.—Well, will you agree upon the date, the year?

Mr. ANDREWS.—Yes, your Honor, we agree on that date, 1905.

The COURT.—You consent then—

Mr. ANDREWS.—Yes, your Honor.

The COURT.——that this may be admitted as an exhibit, do you, Mr. Andrews?

Mr. ANDREWS.—Yes, your Honor.

The COURT.—Very well. This will be admitted as Exhibit "A," for the plaintiffs.

Mr. OLSON.—At the time of this agreement, which has been admitted in evidence as complainant's Exhibit "A," was executed, the plaintiff was at that time the owner and holder of promissory notes which have been admitted in the answer.

Mr. ANDREWS.—That is admitted.

Mr. OLSON.—Paragraph 5 of the first count of the complaint.

The COURT.—When this Exhibit "A," now admitted, was executed, namely on the 25th of November, 1905, the present plaintiff was the owner and holder of all of the promissory notes mentioned in the complaint?

Mr. OLSON.—Exactly. That is admitted?

Mr. ANDREWS.—Yes. [54]

Mr. OLSON.—At this time, if the Court please, I wish to offer in evidence testimony of Thomas C. White, taken before the Honorable T. B. Stuart, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on Thursday, February 10th, 1916, the same having been taken by consent of the parties, together with the exhibit therein referred to, which is among the papers, I think.

The COURT.—I assume that the Circuit Judge

before whom it was taken disposed of any objections that were made?

Mr. ANDREWS.—He reserved the question of the ruling until the final decision of the case, so we have to put it up to your Honor finally, but it was taken before the Judge and all objections were made and argued out at that time. As your Honor will see, he reserved the ruling on my principal objection until the entire case was presented.

(Mr. Olson reads testimony.)

Mr. OLSON.—At this time I will ask the defendants to admit that shortly prior to Mrs. Roy's death she became indebted up to the amount of $1,368.45, in the aggregate, this amount including the $768.00 which is represented by the bill or account attached to Mr. White's testimony of $768.00. That is, in order to permit counsel to make his objection, of course, through the Court's considering $768.00, but counsel, as I understand it, are prepared to admit that that amount of indebtedness had been incurred in the aggregate shortly before her death, including this amount set forth in the account attached to Mr. White's testimony.

Mr. ANDREWS.—I do not like to admit it in that language. Possibly a distinction that—Might admit that, at the time [55] of Mrs. Roy's death, there are claims which have been admitted by the executors against her estate aggregating the sum of $1,368.45, and which claims would include, if allowed, the claim of White in full, $768.00, subject to our objection as to the Statute of Limitations.

Mr. OLSON.—I want to get that correct. Those

are the claims which were presented to the executor, that is the total amount?

Mr. ANDREWS.—Yes, that have been admitted by them.

Mr. OLSON.—And I want the admission in this shape, so that the court would be entitled to take into consideration the $165, which Mr. White testified to in his testimony in addition—

Mr. ANDREWS.—Well, that was paid before her death.

Mr. OLSON.—Yes, I know, but it was an indebtedness. That was at the time of her death, and prior to that time, a few months before, while she was on her deathbed, there is the additional sum of $165.00 testified to by Mr. White which was paid back before her death.

Mr. ANDREWS.—Yes.

Mr. OLSON.—But that was an indebtedness which existed at the same time as these other debts, amounting to $165.00? That is correct?

Mr. ANDREWS.—I suppose so; I do not admit any more than is in the evidence. Whatever is in the evidence I am perfectly willing to admit.

Mr. OLSON.—You are willing to admit that T. C. White testified—

Mr. ANDREWS.—Testified as set forth in that evidence.

Mr. OLSON.—And if the evidence is to be considered, then [56] that is to be considered?

As I understand it, the only item which Mr. Andrews claims cannot be taken into consideration in this proceeding, out of that indebtedness of $1,368.45,

is the amount shown in this account attached to Mr. White's testimony; that is correct, is it not, Mr. Andrews?

The COURT.—Namely, Exhibit "A."

Mr. ANDREWS.—The amount up to within six years of the time of Mrs. Roy's death.

The COURT.—Yes, as shown in that account.

Mr. ANDREWS.—Yes.

The COURT.—All the other indebtedness you admit?

Mr. ANDREWS.—We admit.

Mr. OLSON.—Can be taken into consideration as going toward the breach of the condition, if the condition in the agreement is a valid condition. That is a fair statement?

Mr. ANDREWS.—Yes—I don't like to admit the latter portion of Mr. Olson's statement, because we deny, of course, that there was any valid—

Mr. OLSON.—Oh, yes, I say, but if it is valid condition—

Mr. ANDREWS.—Any valid condition at all. The first part of this we admit absolutely and I think is sufficient.

Mr. OLSON.—I think that covers the matter. Mr. Andrews, do you,—will you admit that within the time prescribed by law for the presentation of claims of creditors against the estates of deceased persons, the plaintiff in this case presented her claim, the claim, the one forming the basis of this suit, and that the suit was within the time prescribed by law for bringing suit, the same having been rejected by the executors?

Mr. ANDREWS.—Yes, that is admitted. [57]

Mr. OLSON.—And will you also admit that none of these notes, I think, principal and interest, except as set forth in the complaint, have ever been paid.

Mr. ANDREWS.—That is admitted.

Mr. OLSON.—And will you also admit allegations of the paragraphs, 1, 2, 3 and 4 of the first count, which you have admitted in your answer; will you admit the allegations therein contained as far as they are incorporated in the 2nd, 3d and 4th counts?

Mr. ANDREWS.—Yes.

Mr. OLSON.—Mr. Andrews having requested me so to do, I will admit that the payment of interest on account of $3,750.00 note, which is set forth—or which allegation is set forth in paragraph 3 of the first count, that payment was made in its entirety, not later than August 19th, 1889, $1,030.00. I wish to state at this time, if the Court please, that the allegation in paragraph five of the first count, wherein it is alleged that Eliza Roy sold and conveyed certain portions of her real estate without the consent of the plaintiff,—that this allegation I have found since the complaint was filed is incorrect. In going over the matter with Mrs. Robinson I did not understand exactly the situation, nor did she. As I find, that one of those deeds was made—that she consented to each one of the conveyances made. One of these conveyances Mrs. Robinson consented to after its actual execution, a few days after its actual execution.

The COURT.—But she ratified it?

Mr. OLSON.—Yes, she ratified it.

(Argument.)

I admit that a few days after the execution of one [58] of these deeds Mrs. Roy and Mrs. Robinson had a conference together, at which Mrs. Robinson gave her consent in writing to the deed already given, a ratification of it, and she did this—did this on account of Mrs. Roy's making these two conveyances to Mrs. Wall and Mrs. White, two of her daughters, which were ratified expressly at the same time they were executed by Mrs. Robinson. In other words, that Mrs. Robinson agreed to and she did ratify and consent to the deeds that were made, upon Mrs. Roy's making conveyances to her two daughters, Mrs. White and Mrs. Wall, at Mrs. Robinson's request, which were consented to expressly in writing by Mrs. Robinson at the time they were executed.

The COURT.—Yes, but do you admit that the deeds, or the making of the deeds which Mrs. Robinson, after its execution, ratified, was in violation of the conditions of the agreement, Exhibit "B"?

Mr. OLSON.—No, I do not admit that it was, because as a matter of fact, it was a deed of gift to Mr. Roy and was not a sale.

The COURT.—Very well then, you make no admission upon this point.

Mr. OLSON.—I admit the conveyance, but I don't the violation of the conditions.

(Argument.)

The COURT.—Then you rest.

Mr. OLSON.—Yes.

Mr. ANDREWS.—If the Court please, the first portion of our defense, we will offer in evidence, and ask permission to do it later, certain deeds made by Mrs. Roy, Mrs. Eliza Roy, to Will Roy and Mrs. Ellen Wall and Mrs. Thomas White, or in [59] their—I don't know whether it is in their husband's names, the deeds, but—or their own names, but we will bring you those as soon as we can obtain them.

Mr. OLSON.—I have no objection to that.

Testimony of Caroline J. Robinson, for Defendants.

CAROLINE J. ROBINSON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. Your name is Carry Robinson? A. Yes.

Q. Mrs. Robinson, I hand you what we call in this case Exhibit "B"; that is the agreement you and your mother made, with Mr. Thurston as a witness, in 1905, November 27th?

A. May I look at it and read it?

Q. Yes. While Mrs. Robinson is examining this document I think I will ask your Honor's permission to amend the complaint by striking out that one allegation I referred to, with Mr. Andrew's consent, which I think he will give.

The COURT.—What is the allegation?

Mr. OLSON.—The allegation on page 5 of the complaint, beginning at the end of the 6th line and reading as follows: "That thereafter, between the 31st day of July, 1908—" (Reads.)

(Testimony of Caroline J. Robinson.)

Mr. ANDREWS.—We do not consent, with all due respect, to that being stricken out.

Mr. OLSON.—I offer to amend the complaint.

(Argument.)

The COURT.—Well, I feel, Mr. Olson, that those lines have gone in there deliberately by your own hand and they ought to stay there, if the defense feels there is any advantage [60] to them in having them there, and, therefore, I will have to rule against you, I think.

Mr. OLSON.—Well, very well, I will just note an exception.

Mr. ANDREWS.—You have read that paper, haven't you? A. Yes.

Q. Now, after that was signed by you and your mother Eliza Roy— A. Yes.

Q. And before your mother's death, did she make any conveyance of real property to Willie Roy?

A. To Willie and the two girls.

Q. Yes, and which was made first, the one to Willie or the one to the two girls?

A. Well, she wanted to make a—one to Willie Roy, and I told her that I wouldn't give my consent unless she gave them share and share alike,—the two girls. I told her the two girls were working for her and nursing her and taking care of her and so I wouldn't—I told her I wouldn't sign any papers unless she treated them all alike and share and share alike.

Q. How did you first know that your mother was making a conveyance to Willie Roy?

(Testimony of Caroline J. Robinson.)

A. She asked me—I went up there and—well, the first time she gave Willie Roy some property I went up and I told her that she—that she was—that she had broken the agreement, and I came home, and then, when she was sick, the last time she was sick, she wanted me to go up, and I went up there. They wired to me and I went up there and we talked it over and she asked if—then I said, too, if she treat them, give them share and share alike, I would agree and I would sign the papers. [61]

Q. Yes, but, Mrs. Robinson, wasn't it a fact that you first knew that she had deeded property to Willie Roy by seeing it in the paper?

A. Yes, but that—at that time, years before this.

Q. Yes, was years before what?

A. Before the last deeds. That—with that—what she gave to Willie Roy and the girls, my sisters.

Q. But it was after this deed that you saw in the papers, to Willie Roy, that was after you and your mother had signed this paper in November, 1905, wasn't it?

A. No, she sold that property to Willie first.

Q. After this— A. Although—

Q. After this agreement, this release was executed, and after she made this agreement with you, then she sold some property to Willie Roy? A. Yes.

Q. Conveyed some property to Willie Roy?

A. Yes.

Q. And you didn't know of that until after you saw it was done in the papers?

A. In the paper, yes, that was the first time.

(Testimony of Caroline J. Robinson.)

Q. And then what did you do, when you saw in the paper that your mother had given certain property or deeded certain property to Willie Roy?

A. I went up to Mr. Thurston and told Mr. Thurston.

Q. That was in Honolulu?

A. In Honolulu. I went right up and I wanted his advice and he told me to—

Q. Your mother was living in Kona, Hawaii?

A. Yes. [62]

Q. And you were living in Honolulu?

A. Yes.

Q. And then you went up to Mr. Thurston, spoke to him about it? A. Yes.

Q. And, without saying what he said or anything, then what did you do? You went to Kona, didn't you?

A. Well, he advised me to find out more about it, to find out the truth about it, so I took this steamer right away and went up.

Q. Went to Kona? A. Yes.

Q. And then you went to your mother's home in Kona? A. Yes.

Q. Do you remember how many days that was after you saw the article in the paper that your mother had deeded this property to Willie Roy that you went to Kona?

A. I really can't remember, but I took the first steamer that left here.

Q. May have been a week afterwards, perhaps?

A. Well, I don't know if it was—you know the

(Testimony of Caroline J. Robinson.)

Mauna Loa used to go once a week, I think.

Q. Once a week?

A. Yes. I can't exactly tell you.

Q. Now, that time when you went up and saw your mother, at the time you took that—the steamer and went up and saw your mother, what did you say to her when you got up there, as near as you can remember?

A. Well, I told her that I saw in the papers that she conveyed some property, land, to Willie Roy, and I looked for the girls' names, I didn't see the girls' names, because mother and I made an understanding that she wanted to give them a few acres apiece, and I said all right and "you have the papers made and send it down and I will sign them," but [63] when I came back, and it was some time afterward, then I saw in the paper where Willie Roy's name—and I looked for the girls' names, I didn't see the girls' names, so I went right up to Mr. Thurston, told him.

Q. When you saw your mother, you told her, "Why, Mother, you have deeded some property to Willie Roy"— A. Yes.

Q. "And you have not deeded to the girls"?

A. I told her.

Q. That is correct?

A. And I told her that, "You know, Mother, that I didn't sign that, that—"

Q. Deed to Willie Roy?

A. Yes, "So you have broken our agreement."

Q. Then what did you do?

(Testimony of Caroline J. Robinson.)

A. Well, I came back again and went up to Mr. Thurston's again and told him, because I wouldn't do anything without his advice, because I wanted his advice—I came up and I went right up and I told Mr. Thurston that my mother has really signed, and I told him that I went to Mr. Paris about it, asked him if it was so and he went to Hawaii and I went to learn that again, and he went up and I came back and went to Mr. Thurston's.

Q. Did you then afterwards consent on this Willie Roy's deed,—your consent to it?

A. Well, I thought—

Q. Did you do so?

A. Yes. The upper part, but the lower of course when they make the deed for me to sign I told my mother I wouldn't sign any property to Willie Roy unless it was that she gave the girls some. [64]

Q. But you did ratify— A. Yes.

Q. This deed that she made to Willie Roy, sometime afterwards?

A. Yes, when she was sick.

Q. About how long was that,—some months afterwards, she made it, or years afterwards?

A. Oh, a few—I think it was three or four weeks before her death; I don't remember.

Q. About three or four weeks before death?

A. It was very—just before her death, because she wanted to see that they had something, you know. It was before her death. I am so nervous I can't—

Q. Don't you worry, we are all old friends of yours; you know everybody here.

(Testimony of Caroline J. Robinson.)

A. I am afraid I might be mistaken.

Q. Don't be. Now, Mrs. Robinson, do you remember how many deeds your mother did make to the girls or to Willie Roy,—any other deeds besides this one you have spoken of, after you and your mother made this agreement between you?

A. I don't remember how many deeds of the property. That was the only three deeds I agreed to.

Q. There was three deeds?

A. There were three deeds, one to Willie Roy and one to my sister Mrs. White and one to my sister Mrs. Wall.

Q. Mr. Paris—I will ask you—told me that there were two deeds to Mrs. Wall and two to Mrs. White; is that correct or—

A. No, I think—I think—I think—I really have forgotten now, I think, because mother came to me again and asked me again; I think Mr. Paris was present at the time [65] that these other deeds—he wasn't there with us—

Q. Now, all of these deeds that were made to the girls, if there was more than one deed,—

A. Yes, sir, whatever it was right.

Q. I don't know, and you don't remember, were they made at the time the deed was made or did you sign them after your mother had given the deeds to the girls?

A. The lawyer made them and took them to my mother's bedroom, and I was there, I think.

Q. At the same time, and signed them?

A. Yes, I signed, but the other deed, about Waiho,

(Testimony of Caroline J. Robinson.)

a piece of old homestead at Waiho, I don't know whether it was made the same day; I have forgotten that.

Q. Who was that given to?

A. To my mother—always said she would give them to my sister Mrs. Wall.

Q. Did she give it to Mrs. Wall? A. I think so.

Q. Was that deed made to Mrs. Wall before you signed it and then you signed it afterwards; when she was sick, or not?

A. Well, all the papers that was given to the girls and Willie Roy, mother and I agreed to give it to them, you know. She asked me and so I agreed to give them that.

Q. The girls?

A. Yes, so the papers was made and I signed.

Q. But now, getting back to Willie Roy's—she didn't ask them— You didn't agree to that at the time she made it; you signed that afterwards, isn't that correct? A. You mean—

Q. The one to Willie Roy, the old deed that was made when you went up to Kona to scold your mother about it, you had [66] not agreed to that before that? A. No.

Q. That was made after?

A. Yes, I thought when she did that she had broken the agreement and I told her that, and I was under the impression and I told her—the lawyer that made the paper all about this so that he could understand.

Q. Now, did you ever make any statements, Mrs.

(Testimony of Caroline J. Robinson.)

Robinson, before your mother's death and claimed that she had broken the agreement? Did you bring any proceedings of any kind against your mother before you brought this proceeding?

A. Well, Mr. Thurston was not present. My—we were waiting for him; he was my attorney. He was not present in town. My mother wanted to see him too but she did—before Mr. Thurston got back—I had nobody to run to; I don't know—I had no—I always went to Mr. Thurston for anything, you know.

Q. Yes.

A. And so I had nobody to advise me then.

Q. So you didn't make any claim, though, until you—yourself at all?

A. I told my mother and I told the lawyer that made the papers that my mother has broken her agreement.

Cross-examination.

(By Mr. OLSON.)

Q. This deed to Willie Roy, which you first did not consent to, which was made without your knowledge and you got notice of it through the newspaper, that was a deed of gift, wasn't it, to Mr. Roy?

Mr. ANDREWS.—That will speak for itself. We object to it. [67]

The COURT.—I think so.

Mr. OLSON.—Q. Well, now, Mrs. Robinson, when —afterwards, as I understand it, you put your written consent on that deed, when Mrs. Roy made the other conveyances to the two sisters, Mrs. Wall and Mrs. White; it was because your mother made these

(Testimony of Caroline J. Robinson.)

deeds to Mrs. Wall and Mrs. White that you signed your— A. Yes.

Q. Written consent on that Roy deed?

A. Yes, that is why I signed it.

Q. And all of the other deeds to Mrs. Wall and Mrs. Roy were signed by you with your consent—that is, you wrote your consent on those deeds?

A. Yes.

Q. At the same time that Mrs. Roy executed them?

A. Yes.

Mr. OLSON.—That's all.

Now, then, Mr. Andrews, I take it, is going to insist upon that motion that he made in connection with taking Thomas White's testimony. Will you present that now? I understand that you moved to strike out all of the items of the account previous to six years prior to the—

Mr. ANDREWS.—Death of Mrs. Roy.

Mr. OLSON.—Death of Mrs. Roy.

Mr. ANDREWS.—Well, I can present it now or can present it on the entire argument just as your Honor prefers.

The COURT.—When will you be ready to present your entire argument?

Mr. ANDREWS.—Right now, your Honor.

The COURT.—Have you any other? [68]

Mr. ANDREWS.—No, your Honor, except with the permission to file these deeds.

The COURT.—You rest then with the exception of that?

Mr. ANDREWS.—Yes.

(Testimony of Caroline J. Robinson.)

The COURT.—Very well, it is understood that the defense shall have permission to file certain copies of any deeds made by the plaintiff.

Mr. ANDREWS.—Made by Eliza Roy.

The COURT.—Made by Eliza Roy to other parties, since the execution of the document on file as Exhibit "B," or, at their option, to bring the books containing the records into court.

Mr. OLSON.—Mr. Andrews wishes to argue this matter of the White testimony in his main argument. I will then proceed with the presentation of the case of the plaintiff.

(Argument.)

Mr. ANDREWS.—Are you willing to admit at this point that Mr. White and his wife made their home at the home of Mrs. Roy for some 15 years or thereabouts prior to her death?

Mr. OLSON.—No, I do not admit that, I do not know that it is the fact.

(Argument.)

I don't want to admit it because I do not consider that it has any materiality in the case. The testimony is flat-footed that it was Mrs. Roy's own obligation and that he paid these bills out for her for her account, at her request.

Mr. ANDREWS.—We would like, if the Court feels—on the Court's suggestion, we would like to open the testimony for the purpose of—this being a matter on which your Honor has facts all the way—

(Argument.) [69]

The COURT.—The defense will be permitted to

reopen the case for the purpose of putting on testimony to that effect.

(Hereupon the further hearing of this case is continued until 2 o'clock to-morrow afternoon.) [70]

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON et al.,

Defendants.

June 2, 1916—Afternoon Session.

Testimony of James K. Aloi, for Defendants.

JAMES K. ALOI, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. And you are employed in the Registrar of Conveyances Office? A. Yes.

Q. Have you Liber 310 of Conveyances there?

A. Yes, sir.

A. Will you please turn to page 5 and tell us what deed you find. I think you— Kindly read them in the record.

The COURT.—Liber 310?

Mr. ANDREWS.—Page 5. Simply read me the deed, please, that you find there.

A. (Reading:) "Know all men by these presents that I, Mrs. Eliza Roy, of Kainaliu, North Kona,

(Testimony of James K. Aloi.)

Island, County and Territory of Hawaii, for and in consideration of the sum of one (1) dollar to me paid by my son, William F. Roy, the receipt whereof is hereby acknowledged, do hereby, grant, bargain, sell and convey unto said William F. Roy [71] all that certain fenced lot in Kawanui 2, North Kona, Island of Hawaii, being a portion of L. C. A. 8559 B, to W. C. Lunalilo, and described as follows—"

Mr. ANDREWS.—Unless your Honor wishes it, by consent of counsel we can omit the description of that land.

Mr. OLSON.—That is consented to.

Mr. ANDREWS.—Omit the description then and proceed.

A. (Reading:) "To have and to hold said granted premises, with the privileges and appurtenances thereunto belonging, unto said William F. Roy, his heirs and assigns forever, in witness whereof I have hereunto set my hand and seal this 31st day of July, A. D. 1908. Mrs. Eliza Roy, his cross-mark." That is the—

Mr. ANDREWS.—The acknowledgment is by consent omitted.

Mr. OLSON.—That is correct.

Mr. ANDREWS.—Q. Now, after that, the next deed, will you please tell us what it is?

Mr. OLSON.—It is on page six.

Mr. ANDREWS.—Well, we will withdraw that question, if the Court please.

Q. Now, will you please turn to page 317—no liber 317 at page 9. A. Yes.

(Testimony of James K. Aloi.)

Q. Will you please read what you find there?

A. (Reading:) "This Indenture made this 30th day of March, A. D. 1909, by and between E. H. F. Wolter, trustee—"

Mr. ANDREWS.—No, no, that is a mistake; that is not the one we want. Is this 317?

A. 317, page 9.

Mr. ANDREWS.—No, 317, 151; excuse me. [72]

A. (Reading:) "Know all men by these presents that I, Eliza Roy, of Kawanui, North Kona, Island of Hawaii and Territory of Hawaii, for and in consideration of the sum of one dollar"—the dollar is spelled wrong here—

Q. Well, never mind; that means one dollar.

A. (Reading:) "To me paid by my son, William F. Roy, the receipt is hereby acknowledged, and for love and protection, do hereby grant, bargain, sell and convey and confirm unto the said William F. Roy, his heirs and assigns, all that portion of the land of Kawanui 2, in North Kona, Island of Hawaii, and bounded on the nauka side—"

Mr. ANDREWS.—Well, we will consent—

Mr. OLSON.—To the leaving out of the description.

Mr. ANDREWS.—Yes.

The COURT.—The description is omitted, then.

A. (Reading:) "To have and to hold the said granted premises, with all rights, easements, privileges and appurtenances thereunto belonging, unto the said William F. Roy, his heirs and assigns forever. And I do hereby, for myself, for my heirs,

(Testimony of James K. Aloi.)

executors, covenant with the said William F. Roy, his heirs and assigns, that I am seized in fee simple of the said granted premises; that they are free and clear of all encumbrances; that I will, and that my heirs, executors and administrators shall, warrant and defend the same unto the said William F. Roy, his heirs and assigns forever, against the lawful claims and demands of all persons, in witness whereof I have hereunto set my hand and seal this 23d day of October, A. D. 1909. Mrs. Eliza Roy, her cross-mark."

Mr. OLSON.—I will agree that it contains the acknowledgment and agree that it may be omitted from the record. [73]

Mr. ANDREWS.—Now, I will ask you to turn to page—Liber 355, on page 283.

A. (Reading:) "Know all men by these presents that I, Mrs. Eliza Roy, of Kainaliu, North Kona, Island of Hawaii, and Territory of Hawaii, for and in consideration of the sum of one dollar to me paid by my son, William F. Roy, the receipt whereof is hereby acknowledged, and for love and affection, do hereby grant, bargain, sell, convey and confirm unto the said William F. Roy three acres and ninety-eight one hundredths of an acre of land in Kawanui 2d, North Kona, Hawaii, and being a part of Royal Patent Number 7455 and described as follows: Situated on the north side of Mrs. E. Roy's house lot—"

Mr. OLSON.—We will agree to omit the description.

The COURT.—So ordered.

(Testimony of James K. Aloi.)

A. (Reading:) "To have and to hold the said granted premises, together with all rights, easements, privileges and appurtenances thereunto belonging, unto the said William F. Roy, his heirs and assigns forever. And I do hereby, for myself and my heirs, executors and administrators, covenant with the said William F. Roy, his heirs and assigns, that I am lawfully seized in fee simple of the said granted premises, and that I will, and that my heirs, executors and administrators shall, warrant and defend the same unto the said William F. Roy, his heirs and assigns forever, against the lawful claims and demands of all persons. In witness whereof I, Mrs. Eliza Roy, have hereunto set my hand and seal this 13th day of October, A. D. 1911. Mrs. Eliza Roy, her cross-mark."

Mr. OLSON.—I admit that there is an acknowledgment that [74] appears and agree that it may be omitted from the record.

Mr. ANDREWS.—I now ask you to turn to Liber 371 on page 9. The last page was 283.

The COURT.—Of Liber 355.

Mr. ANDREWS.—Now, your liber is what?

A. Now, my liber is 371, page 9. This is the release by Mrs. Robinson. (Reading:) "Know all men by these presents, that whereas I, Caroline J. Robinson, am the holder of a mortgage on that tract of land known as Kawanui 2, North Kona, Hawaii, and whereas my mother, the owner of said tract, heretofore conveyed three portions of said tract to my brother, William F. Roy, by deeds dated and

(Testimony of James K. Aloi.)

recorded as follows, to wit: One, October 13, 1911, recorded in the office of the Registrar of Conveyances in Liber 355, on pages 283 and 284—"

The COURT.—That date is—

A. October 13, 1911.

The COURT.—All right, go ahead.

A. (Reading:) "Two, April 23, 1909, recorded in the office of the Registrar of Conveyances in Liber 317 on pages 151 and 152. Three, July 31st, 1908, recorded in the office of the Registrar of Conveyances in liber 310 and pages 5 and 6. Now, therefore, in consideration of the act of my mother in making these and other conveyances, and the sum of one dollar to me in hand paid by said William F. Roy, the receipt whereof is hereby acknowledged, I, the said Caroline J. Robinson, do hereby release and discharge said mortgage on the land described in the three aforesaid deeds, and I acknowledge full satisfaction of said mortgage as to the said three tracts of land. In witness whereof I have hereunto set my hand and seal on this 18th day of June, A. D. 1912, [75] Caroline J. Robinson."

Mr. OLSON.—We admit that that is acknowledged and it appears in the record. That is the consent that has been referred to in the testimony of the witnesses.

Mr. ANDREWS.—I presume so. That is what I have offered it, for that purpose.

Mr. OLSON.—Let's have it understood that is so.

Mr. ANDREWS.—Yes.

(Testimony of James K. Aloi.)

Mr. OLSON.—That is understood, then?

Mr. ANDREWS.—Yes, as I understand it.

That is all; thank you.

Testimony of John D. Paris, for Defendants.

JOHN D. PARIS, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. Mr. Paris, your name is John D. Paris, is it not? A. Yes.

Q. And what—was your wife a relation of Mrs. Eliza Roy?

A. She was a daughter of Mrs. Eliza Roy.

Q. And you knew Mrs. Roy during her lifetime, did you not? A. I did.

Q. Do you know a man named Thomas White?

A. I do.

Q. What relation was he, blood or by marriage, to Mrs. Roy? A. He married her daughter.

Q. And during the last 13 or 14 years where did Mr. Thomas White live?

A. Most of the time at Mrs. Roy's house.

Q. And his wife there, too?

A. They were both there most of the time. [76]

Q. There has been some testimony as to a telephone in the house, Mr. Paris. You were familiar with the house, were you not? A. I was.

Q. And the family? A. Yes, sir.

Q. Could you say who—for whose use that tele-

(Testimony of John D. Paris.)

phone was put in or by whom it was used?

Mr. OLSON.—Just a moment now; I object unless it is shown—

Mr. ANDREWS.—During the 12 or 13 years before Mrs. Roy's death?

Mr. OLSON.—I object to that, if the Court please, on the ground that there is no qualification shown.

The COURT.—Do you simply ask if he knows?

Mr. ANDREWS.—Yes.

A. Well, I know the telephone was in Mr.—

Mr. OLSON.—Don't give any testimony. You are asked if you know one way or the other.

A. Well, nothing further than the telephone in my house is supposed to be my telephone, and this telephone was in Mrs. Roy's house and was supposed to be her telephone.

Mr. ANDREWS.—All the family used it, did they not, to your knowledge?

Mr. OLSON.—I object.

Mr. ANDREWS.—Did all the family use it?

Mr. OLSON.—I object on the ground it is—

Mr. ANDREWS.—Q. To your knowledge?

Mr. OLSON.— —immaterial, has no tendency to prove any of the issues in this case.

The COURT.—If you get down to the conditions under which Mr. White was living there,—whether as member of the family [77] together with his wife, making their home there, whether they were paying board, whether they were paying rent, or whether they were simply conducting the house and having the mother-in-law live with them, or whether

(Testimony of John D. Paris.)

they were living with the mother-in-law or what,—I think that is the real substance of what we want to know.

Mr. ANDREWS.—All right, Mr. Paris, will you please tell me the—as your Honor has made a statement of what he considers the material facts—will you please tell me what you know of Mr. White's living at the house, Mrs. Roy's house; in what capacity did she live there, as explained by his Honor.

A. Well, of my own knowledge, all that I know he was living there, I think with that—Mrs. Roy as her son-in-law, and just what their—not as boarder, I don't think, but exactly how much he contributed towards the general family expenses, I don't know.

Q. If anything; do you know whether he contributed anything?

A. I think probably he did contribute something. I don't know positively of my own knowledge, but that is my idea, that he contributed some.

Q. And his wife was living there during all the time, was she not, with her mother?

A. As I said, most of the time they were at the mother's.

Q. To your knowledge did Mr. White use the phone while he was living there for business purposes?

A. Yes, I think he did. Indeed, I know he did.

Q. Is it not a fact that he conducted most of his business from the house during the time he lived with Mrs. Roy?

A. In the early—or his early years of staying

(Testimony of John D. Paris.)

there I think he did. Later on he went—when he became land agent [78] and had the business of the Bishop estate, he had an office in which he had an office phone.

Q. Can you tell me what year it was that he became agent for Bishop & Company, land agent?

A. I don't think I can. It seems to me the land agent—I have an idea was along in 1906, and the Bishop Estate—whether it was—I think a little before that time or a little after; I ain't quite sure; somewhere along there.

Q. And he lived up—and Mrs. White—he and Mrs. White lived with Mrs. Roy until Mrs. Roy's death?

A. Most of the time they had a beach house and also a cottage in the—on a piece of land that Mrs.—that they were—Mrs. Roy gave them.

Q. That Mrs. Roy gave them? A. Yes.

Mr. ANDREWS.—That's all.

Cross-examination.

(By Mr. OLSON.)

Q. Mr. Paris, Mr. and Mrs. Roy lived there at Mrs. Roy's house, did they not? A. Yes.

Q. That is, this house you have been speaking of where the telephone was, was Mrs. Roy's place, her house? A. He first was in a cottage.

Q Yes, but— A. In the yard.

Q. I mean the place where the telephone was; that was Mrs. Roy's home?

A. That is the main telephone, yes.

Q. That was Mrs. Roy's home? [79]

(Testimony of John D. Paris.)

A. That was Mrs. Roy's home, yes.

Q. Now, it is the fact, is it not, Mr. Paris, that the Whites, Mr. and Mrs. White,—she being Mrs. Roy's daughter, and Mr. White her son-in-law,—lived there with Mrs. Roy because Mrs. Roy wished them to do so, wished them to live there with her, isn't that so?

A. Well, I think that—I presume it was; I think so.

Q. And to a certain extent, to a large extent, Mrs. Roy being rather an elderly lady, wished to have them there and have Mr. and Mrs. White in a way sort of look out for her and her affairs?

A. Yes, that is true.

The COURT.—Who did the housekeeping, Mr. Paris?

A. Well, that is more than I can say. I think it was—exactly how it was divided among them I can't say.

Q. But you have been there hundreds of times, haven't you?

A. Yes. Well, Mrs. White, when there was a party or anything of that kind, or an entertainment, she took charge of it.

Q. If there were guests to entertain there, come either expectedly or unexpectedly, to be entertained there for the day or night or more, who was in charge of their entertainment?

A. Well, Mrs. Roy, if— It depended on what guests they were. If they were Mrs. Roy's friends, why, she generally took charge of the entertainment;

(Testimony of John D. Paris.)

if they were—that is, her old acquaintances and so on. If they were practically malihinis or people that perhaps had met Mrs. White or Mr. White, why they took the charge of them entirely.

Q. It was a case, was it not, where Mr. White married the daughter of the house and simply went in and hung up his hat? [80]

Mr. OLSON.—Oh, no, I object to that if the Court please, on the ground that it is not a fair comment.

The COURT.—I have asked the question, was that the situation. In other words, did he go there to live and to make that his home?

Mr. OLSON.—Now, if the Court please, that is a—With all due respect I think that all the evidence that has been introduced so far goes to show that Mr. White was living at this house more at Mrs. Roy's wish than his own.

(Argument.)

The COURT.—Q. Did he make that his home immediately after marriage?

A. He did. Well, not the place he went for a time; they went to Kekauhono and took charge of a small dairy that Mrs. Roy had up there, and the boys, and I don't exactly know how long they lived there, back and forth, and then came down to the main house, and the most of the time has—that has been their home.

Q. Was there any other daughter at home with Mrs. Roy? A. Mrs. Wall was at home.

Q. Yes; was she married at that time?

A. No, she was not.

(Testimony of John D. Paris.)

Q. Yes. Well, then, she married and moved away; Mrs.—the present Mrs. Wall married and moved away to live with her husband elsewhere?

A. She moved into another house, home of Mrs. Roy's, at Waiho.

Q. Yes; some distance away. Then was there any daughter left at that time?

A. No, there was not, after her marriage; she was the youngest of the family. [81]

Q. And that was the time, was it not, that Mrs. and Mr. White came back to live with the mother?

A. No, previous to that they had been there.

Q. Oh, yes, back before Mrs. Wall was married?

A. Yes.

Q. So that it was, as far as you could observe, the case of a married daughter continuing to live with her husband in her mother's home?

Mr. OLSON.—I object to the question on the ground that it assumes what the witness has testified—has not testified, he having testified that originally, when they were first married, that he did not live in the home.

The COURT.—Well, I am speaking now of the time after they did come home. I withdraw that question. I sincerely hope that nobody has taken offense at the expression I used, "went in and hung up his hat." I meant there was a home, that instead of taking his wife away he went into her home, as many do.

Q. Do you know, Mr. Paris, who paid the housekeeping bills there? I presume there were large

(Testimony of John D. Paris.)

grocery bills and such things as that; were they charged up to Mrs. Roy? A. I don't know.

Q. Or Mr. White?

A. Part of them, I presume—I know that Mrs. Roy paid part of them. I presume that Mr. White paid. I don't know what she paid; I know it was some of the bills that were paid shortly before her death or—for housekeeping expenses, I think, that were paid by Mrs. Roy, and also at different times there was—exactly how—what proportion I can't of my own knowledge say. [82]

Q. Do you know who ordered the telephone installed? A. I do not.

Q. Do you know whether it was installed before or after Mr. White's marriage; before or after he went there to live?

A. I think it was before. I am pretty positive it was.

The COURT.—Anything further, gentlemen? That's all.

Mr. OLSON.—Now, then, in regard to this matter, Mr. Paris. Mr. Paris, I understand that, outside of this thirteen hundred and sixty-eight dollars and odd cents, forty-five cents, I think it was, obligations in the total, of Mrs. Roy, which included the $760 for telephone bills, I understand now that Mrs. Roy had incurred and owed just before her death, and paid just before her death, two or three other bills,—see if I am correct,—approximately one hundred dollars, somewhat more than one hundred, say one hundred flat to Hackfield & Company, sixty dol-

(Testimony of John D. Paris.)

lars to a man named Weisman, and about forty dollars to the Greenwells, was that correct?

A. Thereabouts, yes.

Q. That is in addition to the $1,368.00?

A. Yes, a hundred—

Q. $171.00 of Mr. White? A. Mr. White, yes.

Mr. ANDREWS.—They were all paid by Mrs. Roy?

Mr. OLSON.—Just before her death, wasn't it?

A. Yes, shortly before, two or three—probably two or three weeks, I think, before her death.

Q. Had they been running long?

A. I don't know exactly how long they had been running. There was some cattle sold and these amounts were paid. She [83] asked—she asked me to see these cattle were sold, sent for her son and were paid. I paid that for her and gave her the receipts.

Mr. ANDREWS.—That's all.

Mr. OLSON.—That's all.

That is our case, your Honor.

I HEREBY CERTIFY the above and foregoing to be a complete and accurate extension of my shorthand notes of the testimony taken in the above-entitled cause on June 1st, 1916, and June 2d, 1916.

JAMES L. HORNER,
Official Reporter.

[Endorsed]: L. 7950. 4/146. Caroline J. Robinson vs. Lorrin A. Thurston et al. Transcript. Filed at 3:50 o'clock P. M., Jany. 9th, 1917. B. H. Kahalepuna, Clerk.

No 993. Rec'd and filed in the Supreme Court Jan. 19, 1917, at 2:50 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [84]

Plaintiff's Exhibit "A"—Batch of Statements of Account, etc.

Law No. 7950. Plaintiff's Exhibit "A." Filed Feb. 10, 1916. B. N. Kahalepuna, Clerk

Kealakekua,

~~Honolulu,~~ H. T., July 25, 1912.

M——— Mrs. E. Roy.

THOMAS C. WHITE,

Kealakekua, Hawaii.

1912.

July 25. To telephone bill as per statement attached..... ....$768.00

L. N. 7950. Plaintiff's Exhibit "A." Filed June 1, 1916. Huron K. Ashford, Clerk. [85]

Duplicate.

Holualoa, Hawaii; December 31, 1903.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. AUNGST, Manager.

Bills Payable Quarterly in Advance.

1903.

Jan. 1. To balance due on account rendered $84 00

Mar. To rent of telephone for quarter ended Mar. 31... 18 00

June. To rent of telephone for quarter ended June 30.. 18 00

Sept. To rent of telephone for quarter ended Sept. 30.. 18 00

Dec.	To rent of telephone for quarter ended Dec. 31...	18 00	156 00
	Cr.		
April.	Cash on account	50 00	
Sept.	do.	66 05	
Nov.	do.	21 95	138 00
	To bal. due.....		18 00

[86]

Duplicate.

Holualoa, Hawaii, December 31, 1904.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1904.			
Jan. 1.	To bal. due on account rendered	$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		
June.	Cash on account.....	36 00	
July.	do.	18 00	
Nov.	do.	18 00	72 00
	To bal. due.....		18 00

[87]

Duplicate.

Holualoa, Hawaii, December 31, 1905.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1905.			
Jan. 1.	To bal. due on account rendered $18 00		
Mar.	To rent of telephone for quarter ended Mar. 31 ... 18 00		
June.	To rent of telephone for quarter ended June 30 ... 18 00		
Sept.	To rent of telephone for quarter ended Sept. 30... 18 00		
Dec.	To rent of telephone for quarter ended Dec. 31.... 18 00	90 00	
	Cr.		
Jan.	Cash on account..... 18 00		
July.	do. 36 00		
Dec. 31.	do. 36 00	90 00	

Paid in full to date.

[88]

Duplicate.

Holualoa, Hawaii, December 31, 1906.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1906.		
March.	To rent of telephone for quarter ended Mar. 31.. $18 00	

June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	72 00
	Cr.		
June 30.	Cash on account.....	18 00	
Oct. 17.	do.	18 00	
Dec. 13.	do.	18 00	54 00
	To bal. due.....		18 00

[89]

Duplicate.

Holualoa, Hawaii, December 31, 1907.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1907.			
Jan. 1.	To bal. due or account rendered .....$	18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		

Feb. 23.	Cash on account.....	18 00		
May 11.	do.	18 00		
July 31.	do.	18 00		
Dec. 31.	do.	18 00	72 00	
	To bal. due.....			18 00

[90]

Duplicate.

Holualoa, Hawaii, December, 1908.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1908.			
Jan. 1.	To bal. due on account rendered $18 00		
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30 ...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		
Jan. 31.	Cash on account.....	18 00	
April 30.	do.	18 00	
Oct. 31.	do.	18 00	54 00
	To balance.....		36 00

[91]

Duplicate.

Holualoa, Hawaii, December 31, 1909.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1909.				
Jan. 1.	To bal. due on account rendered	$36 00		
Mar.	To rent of telephone for quarter ended Mar. 31..	18 00		
June.	To rent of telephone for quarter ended June 30..	18 00		
Sept.	To rent of telephone for quarter ended Sept. 30..	18 00		
Dec.	To rent of telephone for quarter ended Dec. 31...	18 00		108 00
	Cr.			
June 30.	Cash on account.....	36 00		
Dec. 31.	do.	54 00		90 00
	To bal. due.....			18 00

[92]

Duplicate.

Holualoa, Hawaii, December 31st, 1910.

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1910.

Jan. 1. To bal. due on account rendered $18 00

Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31....	18 00	90 00
	Cr.		
April 30.	Cash on account.....	36 00	
Sept. 30.	do.	36 00	72 00
	To bal. due.....		18 00

[93]

Duplicate.

Holualoa, Hawaii, December 31, 1911. 190

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1911.			
Jan. 1.	To bal. due on account rendered	$18 00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18 00	
June.	To rent of telephone for quarter ended June 30 ...	18 00	
Sept.	To rent of telephone for quarter ended Sept. 30...	18 00	
Dec.	To rent of telephone for quarter ended Dec. 31...	18 00	90 00
	Cr.		

Jan. 31.	Cash on account.....	18	00	
May 31.	do.	18	00	
July 31.	do.	18	00	
Oct. 31.	do.	18	00	72 00
	To bal. due.....			18 00

[94]

Duplicate.

Holualoa, Hawaii, June 30, 1912. 190

Mrs. E. Roy (T. C. White)

To Kona-Kau Telephone and Telegraph Co., Dr.

L. S. Aungst, Manager.

Bills Payable Quarterly in Advance.

1912.

Jan. 1.	To bal. due on account rendered ....$	18	00	
Mar.	To rent of telephone for quarter ended Mar. 31...	18	00	
June.	To rent of telephone for quarter ended June 30...	18	00	54 00
	Cr.			
March 31.	Cash on account.....	36	00	
June 30.	do.	18	00	54 00

Paid in full to date.

$768.00.

K–K. T. T. Co.

L. S. AUNGST.

[Endorsed]: 500. L. 7950. [95]

L. No. 7950. Plaintiff's Exhibit "A." Filed June 1, 1916. Huron K. Ashford, Clerk.

In the Circuit Court of the First Judiciary Circuit, Territory of Hawaii.

ASSUMPSIT—L. 7950.

CAROLINE J. ROBINSON,

Plaintiff,

vs.

LORRIN A. THURSTON et al., Executors,

Defendants.

Transcript of the Testimony of Thomas C. White, Taken before the Honorable T. B. Stuart, Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, on Thursday, February 10, 1916.

The COURT.—Is this the case that you have been talking about?

Mr. OLSON.—This is the case, if the Court please, where we were to take Mr. White's testimony, because of the fact that he is in town and wants to return on to-morrow's boat.

The COURT.—Who are you for?

Mr. OLSON.—I am for the plaintiff, and Mr. Andrews is for the defendant. The witness is for the plaintiff.

The COURT.—Now on this day come the parties in this case, and this case is called for trial and it is suggested that the evidence of Mr. White be now taken before this Court, and used upon the trial of the cause. You are not able to get through with the whole trial?

(Testimony of Thomas C. White.)

Mr. OLSON.—No, as we explained to your Honor yesterday, Mr. Paris, one of the defendants, is a necessary witness for Mr. Andrews, and to a certain extent for us also; and his wife was too ill in their home to permit of their coming down Tuesday. [96]

The COURT.—Now, the Court proceeds to take the evidence of said witness White,—what is his name?

Mr. OLSON.—Thomas C. White.

(Mr. Olson makes brief statement of the case.)

Direct Examination of THOMAS C. WHITE.

(By Mr. OLSON.)

Q. Mr. White, your name is Thomas C. White?

A. Yes.

Q. Where do you reside?

A. Kainaliu, Kona, Hawaii.

Q. Island of Hawaii? A. Island of Hawaii.

Q. How long have you resided there?

A. Fifteen years.

Q. Did you know Eliza Roy who lived on the Island of Hawaii in her lifetime?

A. Yes, I married her eldest daughter.

Q. You were her son in law?

A. Son in law,—she was my mother in law.

Q. She is now deceased, is she not? A. Yes.

Q. Having died on the 29th day of August, 1912?

A. Yes.

Q. I will ask you, Mr. White, if, at the time of Mrs. Roy's death, Mrs. Roy was indebted to you in any amount whatever? A. Yes, she was.

Q. Will you state how that indebtedness arose?

(Testimony of Thomas C. White.)

A. By paying bills at her request, and the bill was itemized as a whole—the bills were itemized as a whole and sworn to and presented to the executors of the Eliza Roy Estate.

Q. You filed a claim with the executors?

A. I filed a claim. [97]

Q. I will hand you this lot of documents which are attached together, purporting to be an itemized statement and receipt dated July 25, 1912, and I will ask you if that is a correct statement of the amounts which you had paid out on behalf of Mrs. Roy at her request, and if that is the total amount there which was owing by her to you at the time of her death, for bills paid by you at her request?

A. It was, and the bill made out and given to the executors of the will of Eliza Roy is a copy of this.

Mr. OLSON.—I ask that that be allowed in evidence.

Mr. ANDREWS.—Subject to our examination as to certain items, we have no objection to it being allowed at this time.

The COURT.—It will be allowed in evidence and marked Exhibit "A," and the sheets will be marked 1, 2, 3, 4 and 5.

Mr. OLSON.—Q. Does that statement, Mr. White, that has just been put in evidence as Plaintiff's Exhibit "A," correctly set forth the amount of the bills which you paid at the request of Mrs. Roy?

A. Yes.

Q. Had you been repaid at the time of Mrs. Roy's death any part of that sum of $768, as shown by this

(Testimony of Thomas C. White.)
statement? A. I had not.

Q. Was Mrs. Roy at the time of her death indebted to you in any other or further sums? A. No.

Q. Had she been at any time shortly previous to her death? A. Yes.

Q. About—for what?

A. For moneys lent her at different times.

Q. By you? A. Yes. [98]

Q. Over what period of years?

A. Well, I don't quite remember now; it is several years. Mr. Paris paid that on account, leaving this balance.

Q. When you say several years, what do you mean—about three or four years would you say?

A. I guess all of that.

Q. And how much did that amount to?

A. Amounted to one hundred seventy and some odd dollars—I don't know just what the right figures are. If I had known that this was going to be taken up, I might have brought my book down to show you the exact figures Mr. Paris paid. He paid it by check.

Q. Was it more or less than $175?

A. Around that somewhere—around that,—a little bit more.

Q. A little bit more—but you don't know the exact amount?

A. Might have been $178, somewhere around that; I cannot give you the exact figures.

Q. Was it at least $175? A. Yes.

Q. And when did you say that was paid?

(Testimony of Thomas C. White.)

A. That was paid about a month or five weeks before Mrs. Roy died, somewhere around there. That was paid in check, and Mrs. Roy requested Mr. Paris to pay this bill here—to settle that in cattle.

Q. That is, in what way was it to be settled in cattle?

A. Mr. Paris asked me to drive the cattle,—I was driving up mauka—mauka is the upper lands,—and Mr. Paris asked me if we would bring in Mrs. Roy's cattle so he and I could put a price on it and take out this debt. Mrs. Roy was very anxious to have it settled, but Mr. Paris had to come to Honolulu on business, and as long as he wasn't there, we [99] could not put a price on them. The morning he left, that he was coming to Honolulu, he told me he was coming down on business and wouldn't be able to put any price on the cattle, and he asked me if I wouldn't turn them out again, which I did.

Q. Was Mr. Paris acting for Mrs. Roy?

A. Yes, sir; she asked him to pay the debts.

Mr. ANDREWS.—I move to strike it out as hearsay—all the conversation as to Mrs. Roy's anxiety to pay it.

Mr. OLSON.—Before that is ruled on, I will ask the witness about it.

Q. Did you hear Mrs. Roy make that statement?

A. I was right in the room with Mr. Paris when she told him.

Mr. ANDREWS.—Well, my objection is raised to the conversation between Mr. Paris and Mr. White.

Mr. OLSON.—The witness has stated that Mr.

(Testimony of Thomas C. White.)

Paris was acting for Mrs. Roy, and consequently it simply explains,—it has no real bearing on the issues, except it explains why it was not paid as Mrs. Roy asked Paris to pay it. (Argument.)

Mr. OLSON.—Q. Mr. White, when was this conversation?

The COURT.—Do I understand that you yield to the objection?

Mr. OLSON.—No; I think the next question will show just exactly what Mrs. Roy said, and what this witness heard her say, so it will make it unnecessary to rule upon this objection. Mr. Andrews can renew the objection later if he desires to do so.

Mr. ANDREWS.—This not being a jury case, I can always argue to your Honor.

The COURT.—Yes. The Court will take the objection, so far as made, under advisement.

Mr. OLSON.—Q. When did this conversation that you refer to [100] take place with Mrs. Roy and Mr. Paris, where you were present?

A. You mean the date?

Q. Yes, approximately? A. I don't know.

Q. Well, approximately? A. Well, this was—

Q. How long before her death?

A. It is hard to say,—must have been, I am not sure whether it was just before he paid that check of that other account or whether it was just after.

Q. About that time, was it?

A. It was about that time, when she asked him.

Q. Where did the conversation take place?

A. In her bedroom.

(Testimony of Thomas C. White.)

Q. In Mrs. Roy's bedroom? A. Yes.

Q. In her house? A. Yes.

Q. Who were present at that conversation?

A. Mr. Paris was there; Willie Roy,—of course, he is dead; Mrs. Robinson; Mrs. White was there—

Q. Your wife? A. Yes.

Q. And yourself?

A. I myself; there were several, there were quite a few in the room; I don't remember just now who those were. Mrs. Robinson heard Mrs. Roy—

Q. That is unimportant—just follow my questions, please,—now just what did Mrs. Roy state with reference to this bill of yours, or this account of yours, for bills paid by you at her request,—what did she say?

A. The account that Mr. Paris paid, or this standing account?

Q. This $768 account? [101]

A. She says,—well, she spoke to Paris—"John, you get my pipis together—

Q. What are pipis? A. Pipis are cattle.

Q. Yes.

A. —"and you fix a price on it,—you and Tommie fix a price and settle that account. I want it settled now. It has been running for years and Tommie has kokuaed me with this money and I want it settled—kokuaed is to help.

Q. Now, then, was the account settled in cattle in the way that Mrs. Roy requested it to be done?

A. No.

(Testimony of Thomas C. White.)

Q. And why not,—have you given the reason already?

A. Mr. Paris,—on account of Mr. Paris having to come to Honolulu,he couldn't put a price on the cattle. I had them at Waihou.

Q. Was any settlement made of it thereafter,—this plan of settlement having fallen through, was any settlement made of it? A. On this account?

Q. Yes. A. No.

Q. I will ask you whether or not this bill or this claim of yours as shown by this account, was owing by Mrs. Roy to you at the time that the $175 or $178 that you have already referred to, was paid?

A. Yes.

Q. It was owing to you at the same time?

A. Yes, Mr. Paris told me in my office that he would—

Q. Never mind, don't say anything about Mr. Paris, that is unimportant,—I think that is all. [102]

Cross-examination of THOMAS C. WHITE.

(By Mr. ANDREWS.)

Q. Mr. White, these purport to be charges of telephone bills; that is correct (showing witness bills)?

A. Yes.

Q. In Kona? A. Yes.

Q. Were they due for Mrs. Roy's house?

A. Mrs. Roy's telephone.

Q. Not your own?

A. No, I have mine in my office.

Q. I see the first date is 1903, January 1st, balance

(Testimony of Thomas C. White.)

due on account rendered, $74,—that is prior to January 1, 1903? A. Yes.

Q. Some balance?

A. Well, $6 a month, and telephone is $6 a month, and I paid that $84, all of that, for Mrs. Roy. She asked me if I wouldn't help her and pay her telephone bill.

Q. What I am trying to get at is this $84 was for some time at $6 a month, prior to January 1st, 1903?

A. Yes.

Q. That would go back how many months?

A. That is fourteen months.

Q. So that the original bill of which this charge was a part was a debt incurred in 1901—when did you make these payments—from time to time?

A. Yes; you will see the credit dates here.

Q. That was $138 paid in 1903? A. Yes.

Q. That is correct, is it not?

A. Yes, leaving a balance.

Q. Leaving a balance of $186? A. Yes. [103]

Q. In 1904, according to this, you paid $72?

A. Yes.

Q. And so on according to these balances here?

A. Yes.

Q. That is correct, is it? A. Yes.

Q. You had no written instrument requesting you or authorizing you to pay her bills—it was simply a verbal arrangement with her?

A. Yes, she couldn't write.

Q. So did she ask you to pay these bills for her or did you as her son in law pay them?

(Testimony of Thomas C. White.)

A. She asked me to pay them.

Q. And you never made any effort to collect until she died?

A. I never intended to present this bill. She was sick on her deathbed, and I never intended to present this bill at all. It was at her request. Mr. Paris and her son William Roy were in there with her, and she called me from the office and said: "Tommie, I want you—you have been kokuaing me with this telephone bill all these years. I want you to make out that bill," and I went out and waited for several days before I drew it up. I was very much surprised that she should ask that. She said that if she didn't have the bill now and could see it and acknowledge it, why I would have to bring it against her estate after her death. And so I had the bill all fixed up and I presented it to her. And Mr. Paris and them were there, and they saw the bill, and Mr. Paris said: "Mother," her says, "is this right"? And she asked him how much it was and the different items, that is, the dates,—about when—what date it ran from,—and she said: "Yes, that is a correct bill"; "and John," she said, "I want it paid." I said, "Mother, I never expected to present this bill to you at all; I [104] don't know why it is you have asked me for it"; and then that is when she told me I might present it after her death against her estate; and she acknowledged it and she turned to Mr. Paris, and she said, "John, I had another item—another item of that account, of that money"—I mean cash that I lent her, and she asked him to settle the whole account and to get her

(Testimony of Thomas C. White.)

cattle and see if she had enough to settle it, and that is how the conversation between Mr. Paris and her and I came about,—and he could not possibly come up because he was called to Honolulu on some law case.

Q. You did not consider this a charge against Mrs. Roy until she asked you to make it out?

A. She asked me for the account and said she owed that bill and wanted it settled, because I had been helping her all those years with that account.

Q. Then when you had paid these moneys, you had not paid them with the intention of charging her with it, but you paid them to help her out?

A. I paid them for her account. It was an account,—indebtedness that she incurred with the telephone people which I paid at her request.

Q. And did you intend to charge it to her?

A. She—

Q. Did you, when you made this bill, intend to charge it to Mrs. Roy?

A. At the time I did, yes; at the time I did and just when she was so sick I didn't want to bother with any bill, and I wasn't going to present it at all.

Q. Then you want to change your testimony when you said you never wanted to charge her?

A. I never intended at the last to present this bill to her at all. [105]

Q. But through all these years from 1901 on, you never had presented her with a bill at all?

A. No. I never had presented her with a bill.

The COURT.—In whose name was the contract

(Testimony of Thomas C. White.)

with the Telephone Company?

Mr. ANDREWS.—In Mr. White's and Mrs. Roy's. It says, "Mrs. E. Roy," and in parentheses, "T. C. White."

WITNESS.—He put my name on because he looked to me for the money for Mrs. Roy's.

Mr. ANDREWS.—That is all, Mr. White.

Redirect Examination of THOMAS C. WHITE.

(By Mr. OLSON.)

Q. Just a moment; does this statement which has been admitted in evidence here as Exhibit "A," show the dates of the payments by you on account, cash on account? A. Yes.

Q. And those are correctly set forth, are they?

A. Yes; and those can be checked up on the telephone books.

The COURT.—You say the charges are made against her?

Mr. ANDREWS.—Presumably, as far as we can see.

Mr. OLSON.—Q. These are bills of Mrs. Roy's?

A. Those are bills of Mrs. Roy's; they are on the books, Mrs. Roy. When I paid it, he put my name on it, because she asked me to pay it for her. My own telephone account is different from that; I have my office telephone.

Mr. OLSON.—That is all.

Mr. ANDREWS.—I wish to make a motion; in fairness I think it ought to be made now to protect any rights we may have. I move that all the items on this bill, admitted payments by Mr. White prior

(Testimony of Thomas C. White.)

to six years, for six years prior to the [106] death of Mrs. Roy, to wit, the 29th day of August, 1912, be not allowed on the ground of the statute of limitations.

Mr. OLSON.—If the Court please, this is a running account, right along, paid quarterly by Mr. White,—a running account is never barred as long as the account continues to run.

Mr. ANDREWS.—I do not see that it is a running account. These are voluntary payments made by Mr. White without any contract from Mrs. Roy, or writing.

Mr. OLSON.—It does not make any difference whether it was writing or not. Mrs. Roy requested Mr. White to pay these bills when they became due, and that is a running account if anything could be; continues to run until the account is closed. Now, then, this shows that that account was finally closed out in 1912, up to the time of her death, as a matter of fact; and then another thing is this,—according to the testimony Mrs. Roy acknowledged the indebtedness just before her death.

WITNESS.—May I say a word, Judge?

The COURT.—Yes.

WITNESS.—When Paris paid that $170,—I gave him a receipt on account; balance due, $768.

(Argument.)

Mr. ANDREWS.—I am perfectly willing that should be submitted to your Honor when we argue the entire matter, because I have a question of law in this case that will come up before we go into this,

(Testimony of Thomas C. White.)

and I do not want to argue it piecemeal, but I want to do this to preserve my rights.

The COURT.—I will not rule on your objection now, Mr. Andrews. I will know more about the case when I come to [107] try it. I am rather inclined to think that this is a running account,—that is the way I feel now; runs along regularly through these months from year to year, right straight along; no break in it, I guess. Well, is that all?

Mr. OLSON.—That is all.

The COURT.—I will reserve the ruling on the objection. When do we take up this case again?

Mr. OLSON.—I think that will depend entirely on how soon Mr. Paris can get to Honolulu. Of course, both Mr. and Mrs. Paris are rather heavily interested.

The COURT.—The case is continued to a date hereafter to be fixed. [108]

I hereby certify that the foregoing is a full, true and correct transcript of my shorthand notes, taken upon the hearing of the evidence of Thomas C. White, a witness in the above-entitled cause, on Thursday, February 10, 1916.

ELLEN K. DWIGHT,

Official Shorthand Reporter, First Circuit Court.

Honolulu, Hawaii, May 25, 1916.

[Endorsed]: L. 7950. L. No. 7950. Plaintiff's Exhibit "A." Filed June 1, 1916. Huron K. Ashford, Clerk. No. 993. Rec'd and filed in the Supreme Court Jan. 19, 1917, at 2:50 o'clock P. M. Robert Parker, Jr., Assistant Clerk. 21. [109]

Plaintiff's Exhibit "B"—Release, Dated November 27, 1905, Caroline J. Robinson to Mrs. Eliza Roy.

THIS AGREEMENT made this twenty-seventh day of November by and between Caroline J. Robinson of Honolulu, Territory of Hawaii, and Eliza Roy, widow of W. F. Roy of Kona, Island of Hawaii,

WITNESSETH:

WHEREAS the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums:

1.	On Promissory Note of W. F. Roy and Eliza Roy dated July 23, 1895, with interest at the rate of 8% per annum .....$	125.
	Amount of interest to date.....	103.33
2.	On Promissory Note signed by W. F. Roy dated Sept. 23, 1884, and assumed by said Eliza Roy, with interest at the rate of 9% per annum from March 23, 1889.....	2,000.
	Amount of interest to date.....	3,000.
	The same being secured by mortgage of real estate dated Sept. 23, 1884 and recorded in the Registry of Deeds in Honolulu, in Book 91 on pages 411–413.	
3.	On Note of Eliza Roy dated July 31, 1886, with interest at the rate of 9% per annum from July 31, 1889, the same being secured by mortgage of real estate dated July 31, 1886, recorded in the Registry of Deeds in	

said Honolulu in Book 99, on pages 488–489 ..... 3,750.
Amount of interest to date 5,512.50
Total amount of Principal and interest as of November 23, 1905....$14,490.83

AND WHEREAS the said Caroline J. Robinson has agreed [110] to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claim under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions:

NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars ($10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline J. Robinson is hereby acknowledged and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Robinson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

PROVIDED, HOWEVER, that if the said Eliza Roy shall at any time hereafter mortgage or sell any of her real estate or shall incur indebtednesses amounting at any one time to the sum of One Thousand Dollars ($1,000) and upwards without the consent in writing of the said Caroline J. Robinson,

then and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtednesses and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made.

The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, [111] executors, administrators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtednesses in excess at any one time, of the sum of One Thousand Dollars ($1,000).

And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtednesses and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Robin-

son, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgment of payment and release had not been made.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first above written.

CAROLINE J. ROBINSON.

her

ELIZA ROY. X

mark

Witness:

L. A. THURSTON.

[Endorsed]: Copy. Release. Caroline J. Robinson to Mrs. Eliza Roy. Dated November 27, 1905.

L. No. 7950. Plaintiff's Exhibit "B." Filed June 1, 1916. Huron K. Ashford, Clerk.

No. 993. Rec'd and filed in the Supreme Court Jan. 19, 1917, at 2:50 o'clock P. M. Robert Parker, Jr., Assistant Clerk. 22. [112]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

No. 993.

CAROLINE J. ROBINSON

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased.

Opinion.

Hon. C. W. ASHFORD, Judge.

Argued April 30, 1917. Decided June 15, 1917.

ROBERTSON, C. J., QUARLES and COKE, JJ.

Contract—release on condition subsequent.

The release of an existing debt upon conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs. The release will be avoided if the conditions are not complied with.

Same—illegal contract not to be enforced by court.

A party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. Courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare.

Same—void as against public policy.

The state has a general interest in the freedom of its people in the exercise of their legal and normal rights and any contract that is subversive of those rights [113] without any benefit to the restrainor is against public policy.

Same—same.

A contract which attempts to restrain another from incurring indebtedness in the sum of one thousand dollars and upwards without limit as to time or place, without benefit to the coven-

antee, is an unreasonable restraint of trade and void because against public policy.

Pleading—rule of court.

A rule of court requiring a defendant to give notice that the defense of illegality will be relied upon does not apply where the illegality appears upon the face of the plaintiff's complaint. [114]

OPINION OF THE COURT BY COKE, J.
(ROBERTSON, C. J., Dissenting.)

The defendants are the executors of the will of Eliza Roy, deceased, who died on or about August 29, 1912. The plaintiff is a daughter of Eliza Roy. On November 27, 1905, and for a long time prior thereto, Eliza Roy was indebted on three separate promissory notes which were at that date owned and held by plaintiff. The total amount of indebtedness on these several obligations amounted, in principal and interest, to $14,490.83, the greater part of which was accumulated interest. On that date the plaintiff and Eliza Roy entered into an agreement respecting said indebtedness, in which agreement Eliza Roy acknowledged the indebtedness of $14,490.83 as due from her to the plaintiff Caroline J. Robinson, and the said Caroline J. Robinson, in consideration of the sum of ten dollars and in further consideration of the covenants and agreements of Eliza Roy set forth in the agreement, acknowledged full payment and settlement of the indebtedness upon the proviso that if Eliza Roy should at any time thereafter mortgage or sell any of her real estate or incur indebtedness amounting at any one time to the sum of one thousand dollars

and upwards, without the consent in writing of Caroline J. Robinson, then and in such case the acknowledgment of payment of said indebtedness, and the release and cancelation and discharge of said notes would be null and void and of no effect, and the said indebtedness would thereby become immediately due and payable. As this case turns entirely upon the agreement made between Eliza Roy and plaintiff, the same is set forth in full as follows, to wit:

"This agreement made this twenty-seventh day of November by and between Caroline J. Robinson of Honolulu, Territory of Hawaii, and Mrs. Eliza Roy, widow of W. F. Roy of Kona, Island of Hawaii, Witnesseth:

"Whereas the said Eliza Roy is indebted to the said Caroline J. Robinson in the following sums:" (Here the notes are separately listed and described.) [115]

"Total amount of principal and interest as of November 23, 1905, $14,490.83.

"And Whereas the said Caroline J. Robinson has agreed to cancel and release the said indebtedness and the said notes and mortgages and to release the said Eliza Roy from said indebtedness and all claims under said notes and mortgages on the terms and conditions hereinafter contained; and the said Eliza Roy has agreed to said terms and conditions;

"Now therefore in consideration of the premises and of the sum of Ten Dollars ($10) to the said Caroline J. Robinson paid by the said Eliza Roy, the receipt whereof by the said Caroline

J. Robinson is hereby acknowledged and in further consideration of the covenants and agreements of the said Eliza Roy hereinafter contained the said Caroline J. Robinson doth hereby acknowledge full payment and settlement of said indebtedness, principal and interest, hereinabove set forth and doth hereby release the same and cancel and discharge the said notes and mortgages;

"Provided however that if the said Eliza Roy shall at any time hereafter mortgage or sell and of her real estate or shall incur indebtedness amounting at any one time to the sum of One Thousand Dollars ($1,000) and upwards without the consent in writing of the said Caroline J. Robinson, then and in any such case this acknowledgment of payment of said indebtedness and said release and cancellation and discharge of said notes and mortgages shall be null and void and of no effect and said enumerated indebtedness and interest thereon shall immediately become due and payable by the said Eliza Roy, her heirs, executors, administrators and assigns to the said Caroline J. Robinson, her heirs, executors, administrators and assigns with interest thereon at the several rates aforesaid, in the same manner as though this acknowledgment of payment and release of said notes and mortgages had not been made.

"The said Eliza Roy in consideration of the foregoing agreements on the part of said Eliza Roy, for herself, her heirs, executors, adminis-

trators and assigns doth hereby covenant and agree with the said Caroline J. Robinson, her heirs, executors, administrators and assigns that she will not, without the approval in writing of the said Caroline J. Robinson, sell or mortgage any of her lands or incur any indebtedness in excess, at any one time, of the sum of One Thousand Dollars ($1,000).

"And the said Eliza Roy doth hereby acknowledge that the said enumerated indebtedness and interest thereon as hereinabove set forth are now due and payable to the said Caroline J. Robinson and doth hereby agree that in case of the violation by her of her said above agreement and covenant, or any part thereof, then and in such case the said indebtedness, principal and interest shall be and become immediately due and payable to the said Caroline J. Robinson, her heirs, executors, administrators and assigns, in the same manner as though this acknowledgment of payment and release had not been made.

"In Witness Whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

"CAROLINE J. ROBINSON,
her
"ELIZA ROY. X
mark.

"Witness:
"L. A. THURSTON."

It is conceded that this agreement was executed November 27, 1905. [116]

After the death of Eliza Roy the plaintiff duly presented to the defendants, as executors aforesaid, her claim under and in respect of said promissory notes, demanding payment thereof. This claim having been rejected by defendants plaintiff commenced her action in the circuit court for recovery of said claim, alleging in her complaint, in substance, that said notes had become due to plaintiff by reason of the fact that after the execution of the agreement of November 27, 1905, and prior to her death, "said Eliza Roy did sell and convey certain portions of her real estate without the consent of the said plaintiff, and did, without the consent of plaintiff, incur indebtedness amounting in the aggregate at one time to more than one thousand dollars."

The defendants answered denying generally all of the allegations of the complaint and gave notice that among other defenses they intended to rely upon the defense of payment, statute of frauds and the statute of limitations. Shortly thereafter defendants filed an amended answer admitting some of the allegations of the complaint and generally denying the allegations not so admitted, and further setting up as a defense that all of plaintiff's claims against Eliza Roy were fully paid and settled by the agreement dated November 27, 1905, and that all of said claims were barred by the statute of limitations. Upon the issues thus formed the cause went to trial before the circuit court of the first circuit without a jury, the right to a trial by jury having been waived by both parties. At the conclusion of the case the trial court rendered a decision in which it found as a fact that

Eliza Roy, prior to her death and after the execution of said agreement of November 27, 1905, did incur indebtedness at one time to an aggregate amount of more than one thousand dollars.

The trial court held, however, that under the provisions of said agreement the claims of plaintiff were totally released and discharged; that the clause in said agreement which [117] acknowledged full payment and satisfaction of the indebtedness and released, canceled and discharged the notes, constituted a complete liquidation thereof; that the same became utterly and absolutely extinguished and could have no further existence as a legal obligation. The trial court adopted the law as expressed in the case of Tyson v. Dorr, 6 Whart. (Pa.) 255, and gave judgment in favor of defendants and plaintiff comes here on a writ of error.

The plaintiff abandoned her claim that Eliza Roy violated the provisions of the agreement against the alienation of her property without the written consent of the plaintiff and now relies solely upon the alleged violation of that part of the agreement which prohibited Mrs. Roy from incurring indebtedness at any one time in the sum of one thousand dollars or upwards without the written consent of plaintiff. Thus the issues are narrowed down to a consideration of this single clause in the agreement. The trial court having found that Mrs. Roy, subsequent to the date of the agreement and prior to her death, did incur indebtedness at one time in the sum of one thousand dollars and upwards, we are unwilling to disturb this conclusion, although the evidence was,

to say the least, not overly strong. It appears from the evidence that after Mrs. Roy's death various debts which she is alleged to have incurred while living were brought to light, amounting in all to the sum of $1,386.45. The greater portion of this indebtedness was made up of a telephone bill which amounted to $768. This bill had been paid by her son-in-law in instalments from time to time and had been running for more than ten years. The son-in-law testified that he never intended to present the bill and that the same was first mentioned while Mrs. Roy was on her deathbed, at which time, it is claimed, she acknowledged the bill and directed that it be paid by her representative. The weakness of the evidence respecting this alleged indebtedness was, perhaps, in a large measure cured by admissions of counsel for defendants made during the trial. [118]

The record now before us discloses that the first note herein referred to was dated in 1884, the second in 1886 and the third in 1895. The last payment made on any of said notes was in the year 1889. The principal of said notes amounts to the sum of $5,875 and the interest now claimed amounts to $12,707. From these facts the statute of limitations would appear to have run against the several obligations long prior to the execution of the agreement between Mrs. Roy and the plaintiff in 1905. There may have been promises to pay or other acts on the part of Mrs. Roy which would have revived the obligations prior to the making of said agreement. Upon this subject the record is entirely silent.

We disagree with the decision of the trial court holding that the effect of the agreement was a complete release and discharge of the indebtedness and that "a man cannot release a personal action as an obligation with a condition subsequent, but the condition will be void, for a personal action once suspended is extinguished forever." The ancient case of Tyson v. Dorr, *supra,* cited in support of this doctrine, has long since been discarded and the modern rule is that a release of an existing debt with conditions subsequent merely suspends the right of action thereon until such time, if ever, the event contemplated occurs.

> "A release may also be subject to a condition subsequent; and in that case the release will be avoided if the condition is not complied with."
>
> 2 Addison on Contracts, Pt. 2, p. 836.
>
> "It is not and never was, true that in no mode and under no circumstances can a personal action be suspended."
>
> Belshaw v. Bush, 11 C. B. 201.
>
> "There are also cases in the books where a contract having been broken, and a cause of action having accrued thereon, a new contract between the debtor and creditor and additional parties, creating new rights and liabilities, has been made and accepted as a conditional accord and satisfaction and discharge of the cause of action, so that if the new contract is carried out by the new parties in all its integrity, the [119] original cause of action is extinguished and gone forever; and if it is not fully carried out

the party is remitted to his original right of action upon the original contract."

2 Addison on Contracts, Pt. 2, p. 838.

See also Newton v. Levy, 6 L. R. C. P. 180.

"We * * * think it would be most unjust for a debtor to be allowed to take advantage of a release only granted on a condition he has not performed."

Hall v. Levy, 10 L. R. C. P. 154.

There is another phase of this case which, while almost wholly ignored in the court below and in the briefs and argument of counsel before this court, demands consideration, and that is the question of the validity of the clause in the agreement between Eliza Roy and plaintiff herein restraining Eliza Roy from incurring indebtedness at any one time to the amount of one thousand dollars or upwards without the written consent of plaintiff. Under other circumstances we might feel constrained to ignore all questions not properly urged for our consideration by counsel. But in this case the agreement is before us and plaintiff can only prevail upon its strength and validity. If we find that the condition in the agreement, for the violation of which plaintiff must depend solely for judgment in this case, is for any reason void, we conceive it to be our duty to so declare.

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in

which he must necessarily disclose an illegal purpose as the groundwork of his claim."

9 Cyc. 546.

See also Pocahontas Coke Co. v. Powhatan Coal & Coke Co., 56 S. E. 264.

"Under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare."

6 R. C. L. 712.

"Whether a contract is against public policy is a question of law for the court."

9 Cyc. 483.

The clause in the agreement hereinabove set out attempted to restrain Eliza Roy from incurring indebtedness at any one time in the sum of one thousand dollars or upwards [120]. without plaintiff's written consent. This restraint is without bounds or limit either as to place or duration. At no time during her life and at no place and under no circumstances could Eliza Roy incur the indebtedness unless with the consent of plaintiff without committing a breach of the condition in the agreement. Occasions might arise where it would be of great advantage to Mrs. Roy and to her estate for her to exercise the right to incur indebtedness in the amount mentioned. An emergency might occur during her lifetime, caused by sickness or otherwise, whereby her self-preservation would demand the exercise of this right. And on the other hand, wherein lay the

benefit to plaintiff by reason of this extraordinary and unusual restraint upon the legal rights of Mrs. Roy, to wit, the right to trade upon her credit? It might be said that plaintiff, being a daughter of Mrs. Roy, would, in the event she died intestate, become one of the heirs of her estate and that for this reason she had an interest in the conservation of her mothers's property. We deem this consideration altogether too remote. Mrs. Roy might have made a will prior to her death devising her property to her other children or even to strangers, in which event the plaintiff would have no interest in the property of which her mother died possessed. See Kalanianaole v. Liliuokalani, *ante,* 457, 472. Then how could plaintiff suffer by the breach of the contract? As a matter of fact Mrs. Roy might, by the exercise of her right to incur indebtedness, have greatly enhanced the value of her estate.

Ch. J. Parker, in Mitchel v. Reynolds, 1 P. Wms. 181, said: "A particular restraint is not good without a just reason and consideration."

> "The * * * question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party *in favour of whom it is given,* and not so large as to interfere with the interests of the [121] public. *Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either,* it can only be oppres-

sive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy."

Horner v. Graves, 151 Eng. Rep. 287; 6 R. C. L. p. 789.

The growth of commerce and the usages of trade demand the free exercise of the right to extend credit and to have credit extended; to enjoy the right to borrow as well as the right to lend; and unless there appears some clear and positive benefit to accrue to the covenantee by reason of the subversion of these rights a contract to that effect will be held an unreasonable restraint of trade and void because against public policy.

"Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made is unreasonable and void, as injurious to the interests of the public on the ground of public policy."

Mallan v. May, 11 Mee. & W. 653. See also 63 Am. Dec. 384.

The state has a general interest in the freedom of its people in the exercise of their legal and natural rights and any contract that tends to curtail those rights without any benefit to the restrainor is against public policy. The right to borrow has been recognized for ages. The commerce of the world is conducted largely on credit, and while the disposition to incur indebtedness may in some instances prove harmful, yet the right to borrow is universally

recognized as a valuable privilege often indulged, and not infrequently to the great benefit and advantage of the borrower. It is not an over-statement to say that countless firms and individuals, and even nations, are constantly being saved from financial wreck and disaster by timely recourse to this privilege.

> "If an agreement binds the parties or either of them, or if the consideration is, to do something opposed to the public policy of the state or nation, it is illegal and absolutely void, however solemnly made. If a court should enforce such agreements it would employ its functions in undoing what it was created to do."
>
> 9 Cyc. 481.
>
> "Any stipulation, agreement or contract which forbids the debtor from discharging his obligation by borrowing the money, in whole or in part, except from the creditor, is subversive of the rights of the citizen, injurious to the general welfare of the public and is therefore void on the high ground of public policy."
>
> Union Cent. Life Ins. Co. v. Champlin, 65 Pac. 836. [122]

While the facts of the case just cited are entirely dissimilar to those of the case at bar, yet the principles of law therein enunciated have application here.

We are of the opinion that the clause in the agreement referred to, which attempted to restrain Eliza Roy from incurring indebtedness to the amount at any one time of one thousand dollars or over with-

out the consent of plaintiff herein, constituted an abnegation of her legal rights, without benefit to plaintiff, was an unreasonable restraint of trade and is therefore void on the ground of public policy. It follows that, the condition being void, an action based upon a breach thereof could not be maintained. The reasons advanced by the trial court for its decision in favor of the defendants were erroneous, but the conclusions are correct and will therefor not be disturbed.

Notley v. Notley, *ante,* p. 724.

The judgment of the Circuit Court is affirmed.

C. H. OLSON and M. B. HENSHAW (HOLMES & OLSON, with them on the Brief), for Plaintiff in Error.

ANDREWS & PITTMAN, for Defendants in Error.

JAMES L. COKE. [123]

CONCURRING OPINION OF QUARLES, J.

I concur in the conclusion and reasoning of the opinion written by Mr. Justice Coke. The theory of the plaintiff as set forth in her complaint is that the notes sued on and the mortgages securing them were released by the agreement of November 27, 1905, such release subject to defeasance upon the happening of either of two conditions subsequent, viz., the alienation of any of her real estate or the incurring of indebtedness to the extent of one thousand dollars at any one time by Mrs. Roy without the written consent of the plaintiff. The plaintiff relies upon the happening of the last condition subsequent

as defeating the release and reviving her cause of action upon the notes sued on here. The agreement is pleaded by plaintiff in effect and copies attached to and made a part of plaintiff's complaint, and the questions upon which the decision here rests are raised in and appear upon the face of the complaint. If the agreement as to the conditions subsequent is not valid and binding, but, on the other hand, is void for the reason that such conditions subsequent are contrary to public policy the complaint shows no cause of action and it is not necessary to plead their illegality or to give notice thereof. The rule of the circuit court requiring notice that the defense of illegality will be relied on was not intended to apply to such defense when it appears upon the face of the complaint. The plaintiff must plead a valid and legal contract. The conditions of defeasance being contrary to public policy and void, and so shown upon the face of the complaint, no question of evidence is involved, the only question being, is the plaintiff entitled to judgment upon her own showing? The trial court held that she was not on the ground that the notes sued on were released by said agreement. The conclusion of the trial court was correct. To hold otherwise would be equivalent to holding that plaintiff is entitled [124] to judgment by reason of a contract against public policy, thereby giving the consent of the court to the enforcement of such contract. In my opinion the court cannot do so and the judgment appealed from should be affirmed.

RALPH P. QUARLES. [125]

DISSENTING OPINION OF ROBERTSON, C. J.

I concur in the ruling made that the circuit court erred in holding that the plaintiff could not recover because, as supposed, a release of a personal obligation upon condition subsequent must as matter of law operate as an absolute release. But I must dissent from the further ruling that the judgment should be affirmed on the ground that the condition subsequent was against public policy and void, and that the release, therefore, was an absolute one. Rule 4 of the rules of the Circuit Court of the first circuit provides that "no defendants shall be allowed to set up" certain defenses, including the defense of illegality, "unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same." The point that the contract is illegal was not raised in the trial court by demurrer, answer or otherwise, nor have the appellees urged it in this court. But it is said that the condition of the release is in and of itself contrary to public policy, and that it is the duty of this court upon its own motion to decline to enforce it. The principal opinion seems to concede, however, that if the provision as to incurring indebtedness in excess of $1,000 was a "benefit" to the plaintiff, or if she might "suffer by the breach" of the contract, or if it was a "reasonable restraint," or if the restraint was not "larger than what was required for the necessary protection" of the obligee, it would not render the condition invalid. Yet, by affirming the judgment of the Circuit Court, this court precludes

the plaintiff from the opportunity of showing, if she could, that the restraint was reasonable, or that the condition was a benefit to her and that she would suffer by its breach. She is practically denied her day in court on that matter. The case of Notley v. Notley, cited in the principal opinion, was an equity appeal, the [126] entire case was before this court upon the facts as well as the law, and the conclusion of this court was based upon evidence contained in the record. This case seems to be decided upon a lack of evidence upon a point which was not agitated in the trial court.

I think the agreement in question is not illegal upon its face because of the condition referred to. Public policy is more concerned with the enforcement of private contracts than it is with defeating them. The Supreme Court of the United States in B. & O. R. Co. v. Voight, 176 U. S. 498, 505, said, "At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare." In Printing etc. Co. v. Sampson, L. R. 19 Eq. 462, 465, Sir George Jessel, M. R., said, "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is

that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice." In 9 Cyc. 542, it is said, "And one may agree not to do what he has a legal right to do, even though the promise may be restrictive of his personal rights." And see, Brooks v. Cooper, 50 N. J. E. 761, 767; Collister v. Hayman, 183 N. Y. 250, 256; Mosler Safe Co. v. Safe Dep. Co., 199 N. Y. 479, 485; Waite v. Merrill, 4 Greenl. 102. In Daley v. People's B. L. & [127] S. Assn., 178 Mass. 13, 19, it was said, "Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own."

Wherein an agreement made with her daughter by an elderly lady living upon her own means and upon her own premises in a country district, who does not appear to have been engaged in any business, trade or profession, upon a valuable and adequate consideration, that she will not incur indebtedness at any one time in excess of $1,000, is unreasonable, oppressive, immoral, or detrimental to public interests or welfare, I humbly confess my inability to see.

A. G. M. ROBERTSON.

[Endorsed]: No. 993. Supreme Court Territory of Hawaii. October Term, 1916. Caroline J. Robinson v. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased. Opinion. Filed June 15, 1917, at 2:20 P. M. J. A. Thompson, Clerk. [128]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

ERROR TO THE CIRCUIT COURT, FIRST CIRCUIT.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON, and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Judgment.

This cause coming on to be heard at the October, 1916, Term of the Supreme Court on writ of error to the Circuit Court of the First Judicial Circuit, jury waived, Messrs. Holmes & Olson and M. B. Henshaw, Esq., appearing for plaintiff in error, and Messrs. Andrews and Pittman appearing for defendants in error, was duly submitted, and the Supreme Court having on the 15th day of June, 1917, filed a written opinion holding that the assignments of error should not be sustained and that the judgment of said Circuit Court in said cause should be affirmed.

IT IS HEREBY ORDERED AND ADJUGED that the said judgment of said Circuit Court herein be and is hereby affirmed, with costs.

Dated, Honolulu, T. H., June 21, 1917.

By the Supreme Court:

[Seal] J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

O. K.—COKE.

[Endorsed]: No. 993. In the Supreme Court of the Territory of Hawaii. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Judgment. Filed June 21, 1917, at 9:42 A. M. J. A. Thompson, Clerk. [129]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

MONDAY, APRIL 30, 1917.

Court convened at 10:00 o'clock A. M.

Present on the Bench: Hon. A. G. M. ROBERTSON, C. J., Hon. R. P. QUARLES and Hon. J. L. COKE, JJ.

ERROR TO CIRCUIT COURT, FIRST CIRCUIT.

S. C. No. 993.

To page 293.

CAROLINE J. ROBINSON

vs.

LORRIN A. THURSTON, and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased.

Minutes of the Clerk of the Supreme Court, Under Dates of April 30 and June 15, 1917.

HEARING.

Appearances:

C. H. OLSON, of the Firm of HOLMES & OLSON, and M. B. HENSHAW, for Plaintiff-Appellant.

L. ANDREWS and W. B. PITMAN, for Defendants-Appellees.

The above-entitled cause being in order and the same having been set for this day for hearing, when the court convened and said cause was called Mr. Henshaw proceeded to state the case and then followed with his argument concluding at 10:50 A. M.

At 10:51 A. M., Mr. Pittman commenced with his argument, concluding at 11:15 A. M., and he was followed by Mr. Andrews who concluded at 11:30 A. M.

At 11:31 A. M., Mr. Olson commenced with his argument concluding at 12:15 P. M. [130]

Mr. Henshaw replied concluding at 12:25 P. M.

The Court directed counsel to file briefs on the question whether or not the agreement between Mrs. Roy and Mrs. Robinson, signed in November, 1905, is an agreement in restraint of alienation and void as against public policy.

Briefs to be in for defendants seven days hence, those for the plaintiff seven days thereafter, and the reply to be in three days after the second brief.

At 12:25 P. M. the court adjourned until 10:00 o'clock next Wednesday morning, May 2.

J. A. THOMPSON,
Clerk Supreme Court.

FRIDAY, JUNE 15, 1917.

ERROR TO THE CIRCUIT COURT, FIRST CIRCUIT.

S. C. No. 993.

From page 270.

CAROLINE J. ROBINSON

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased.

At 2:20 o'clock P. M. this day the Court handed down its written opinion in the above-entitled cause affirming the judgment of the Circuit Court. ROBERTSON, C. J., dissenting.

J. A. THOMPSON,
Clerk Supreme Court. [131]

(Rule 4 of the Rules of the Circuit Court, First Circuit, Territory of Hawaii.)

RULE 4.

Defenses in Personal Actions Specially Pleaded.

In personal actions, the statute of limitations shall be specially pleaded; and no defendant shall be allowed to set up by way of defense to the plaintiff's claim, any illegality, fraud, release, payment, infancy, coverture, or discharge under any statute relating to bankruptcy or insolvency unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same. [132]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Petition for Writ of Error and Supersedeas Returnable to United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii:

Caroline J. Robinson, the plaintiff in error in the above-entitled cause, deeming herself aggrieved by the judgment of the Supreme Court of the Territory of Hawaii, entered and filed on the 21st day of June, 1917, in the above-entitled cause, entitled "Caroline J. Robinson, plaintiff in error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, deceased, defendants in error," comes now, by Henry Holmes and Clarence H. Olson, her attorneys, and hereby humbly petitions said Supreme Court of the Territory of Hawaii for an order allowing the said Caroline J. Robinson, said plaintiff in error, to prosecute a writ of error and have the same allowed from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii under and accord-

ing to the laws [133] of the United States in that behalf made and provided, and that a transcript of the record, proceedings and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit, and also that an order may be made by this Honorable Court fixing the amount of the bond which the said plaintiff in error shall give and furnish upon the said writ of error, and that upon the filing of such bond, all proceedings in and relating to the subject-matter in and of the said cause in the said Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, whether direct or ancillary thereto, be suspended and stayed until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioner shows that the said judgment was rendered in an action at law and that the amount involved in said action, exclusive of costs, exceeds the value of $5,000.00.

WHEREFORE, your petitioner prays that a writ of error may issue out of this Court to the end that the errors existing in the record may be corrected and the said judgment reversed, and judgment given to the said plaintiff in error and full and complete justice may be done in the premises.

Dated, Honolulu, T. H., August 8th, 1917.

CAROLINE J. ROBINSON,
Said Petitioner.

By HENRY HOLMES,
CLARENCE H. OLSON,
Her Attorneys. [134]

Territory of Hawaii,
City and County of Honolulu,—ss.

Caroline J. Robinson, of the City and County of Honolulu, Territory of Hawaii, being first duly sworn, upon her oath, deposes and says:

That she is the plaintiff in error in the above-entitled cause, and is well acquainted with the matters in controversy in said cause, and that the amount involved in the said cause, exclusive of costs, exceeds the value of $5,000.00.

CAROLINE J. ROBINSON.

Subscribed and sworn to before me this 8th day of August, 1917.

[Seal] FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of Hawaii. [135]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,
Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants in Error.

Order Allowing Writ of Error Returnable to U. S. Circuit Court of Appeals and Supersedeas.

Upon reading and filing the foregoing petition for a writ of error together with an assignment of errors

presented therewith, alleged to have occurred in the judgment of this Court and in the proceedings in the trial of said cause prior thereto;

IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Caroline J. Robinson, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause and the proceedings in the trial of said cause prior thereto, and that the amount of bond on said writ of error be, and the same is hereby fixed in the sum of FIVE HUNDRED DOLLARS ($500.00); and that upon the filing by said above-named plaintiff in error of an approved bond in said amount, all further proceedings in said cause in the said Supreme Court of the Territory of Hawaii and the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, shall be stayed and suspended until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

[Seal] A. G. M. ROBERTSON,
Chief Justice Supreme Court for the Territory of Hawaii.

Dated at Honolulu, Territory of Hawaii, this 8th day of August, 1917. [136]

[Endorsed]: No. 993. Supreme Court of the Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Petition for Writ of Error and Supersedeas Returnable to United States Circuit Court of Appeals for the

Ninth Circuit, and Order Allowing Same. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. [137]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Assignments of Error on Return to Writ of Error Returnable to United States Circuit Court of Appeals for the Ninth Circuit.

Comes now Caroline J. Robinson, the plaintiff in error in the above-entitled cause, by Henry Holmes and Clarence H. Olson, her attorneys, and says that in the record and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii, and in the rendition of its final judgment therein, there are, and have intervened, manifest errors prejudicial to the said plaintiff in error, to wit:

I.

That the said Supreme Court erred in affirming the judgment of the Circuit Court of the First Circuit of the Territory of Hawaii in said cause.

II.

That the said Supreme Court erred in not reversing the said judgment of the said Circuit Court and

in not deciding that judgment should be entered in favor of the said plaintiff in error as prayed in her bill of complaint in said cause. [138]

III.

That the said Supreme Court erred in holding and deciding that the agreement, a copy of which is attached to said bill of complaint, marked Exhibit "D," and made a part of said complaint, which said agreement was allowed in evidence in said cause was an absolute release of the promissory notes sued upon in said cause.

IV.

That the said Supreme Court erred in holding and deciding that the condition and proviso in said agreement, providing that if Eliza Roy, one of the parties to said agreement, should at any time after the date of said agreement incur indebtedness amounting at any one time to the sum of One Thousand Dollars ($1,000.00) and upwards without the consent in writing of the said plaintiff in error, then and in such case the acknowledgment of payment of said promissory notes and the release and cancellation and discharge of said notes contained in said agreement should be null and void and of no effect, and the said promissory notes and the interest thereon should immediately thereon become due and payable by said Eliza Roy, her heirs, executors, administrators and assigns, to the said plaintiff in error, in the same manner as though said acknowledgment of payment and release contained in said agreement had not been made, was an unreasonable restraint of trade and void.

V.

That the said Supreme Court erred in holding and deciding that the said condition and proviso in said agreement was against public policy. [139]

VI.

That the said Supreme Court erred in not holding and deciding that the said condition and proviso in said agreement was reasonable and void.

VII.

That the said Supreme Court erred in holding and deciding that the incurring of indebtedness by said Eliza Roy, amounting at one time to more than $1,000.00, which said indebtedness was found and held to have been incurred by said Eliza Roy after the execution of said agreement and the date thereof, did not immediately make the indebtedness enumerated in said agreement with interest thereon as provided in said agreement, become due and payable by said Eliza Roy, her executors or administrators, to said plaintiff in error.

VIII.

That the said Supreme Court erred in not holding and deciding that the said indebtedness incurred by said Eliza Roy immediately made the indebtedness enumerated in said agreement with interest thereon as provided in said agreement, become due and payable by said Eliza Roy, her executors or administrators, to said plaintiff in error.

IX.

That the said Supreme Court erred in not entering judgment in favor of the said plaintiff in error and against the said defendant in error, directing the said Circuit Court of the First Judicial Circuit to

enter judgment in favor of the said plaintiff in error and [140] against said defendants in error as prayed in said bill of complaint.

X.

That the said Supreme Court erred in not holding and deciding that the said condition and proviso in said agreement was valid, and that upon the breach thereof by said Eliza Roy by incurring indebtednesses amounting at one time to more than the sum of $1,000.00, the promissory notes enumerated in said agreement, with interest thereon as provided in said agreement, became immediately due and payable by said Eliza Roy, her executors or administrators, to the said plaintiff in error.

XI.

That the said Supreme Court erred in holding and deciding that the defendants in error were not barred from the defense of illegality of said agreement, by reason of their failure to raise the said defense by demurrer, answer or any other pleading or otherwise, or to give notice of the same in any way, in said Circuit Court, or to urge or raise the same in any way in said Supreme Court.

XII.

That the said Supreme Court erred in not holding and deciding that the defendants in error were barred from the defense of illegality of said agreement, by reason of their failure to raise the said defense by demurrer, answer or any other pleading or otherwise, or to give notice of the same in any way, in said Circuit Court, or to urge or raise the same in any way in said Supreme Court. [141]

XIII.

That the said Supreme Court erred in holding and deciding that the defendants in error were not barred from the defense of illegality of said agreement by reason of their failure to give notice of their intention to rely upon the same, as required by rule 4 of the Rules of the said Circuit Court, which said Rule 4 reads as follows:

> "In personal actions, the statute of limitations shall be specially pleaded; and no defendant shall be allowed to set up by way of defense to the plaintiff's claim, any illegality, fraud, release, payment, infancy, coverture, or discharge under any statute relating to bankruptcy or insolvency, unless he shall, on filing his answer, give notice within his answer or at the foot thereof, of his intention to rely upon the same."

XIV.

That the said Supreme Court erred in not holding and deciding that the defendants in error were barred from the defense of illegality of said agreement by reason of their failure to give notice of their intention to rely upon the same, as required by said Rule 4 of the said Rules of the said Circuit Court.

XV.

That the said Supreme Court erred in holding and deciding that the errors were not committed and did not intervene in the proceedings in the said cause in said Circuit Court and in the rendition of the judgment in said Circuit Court, as assigned by said plaintiff in error upon and in support of the writ

of error in said cause from the said Supreme Court to the said Circuit Court.

WHEREFORE the said plaintiff in error prays that for the errors aforesaid, and other errors appearing in [142] the record of said Supreme Court in the said cause to the prejudice of the plaintiff in error, the judgment of said Supreme Court be reversed, annulled and for naught esteemed, and that the said Supreme Court be ordered to reverse the said judgment entered in said Circuit Court and to order the said Circuit Court to enter judgment in favor of the plaintiff in error as by her prayed, and for such other relief as may be just and proper in the premises, to the end that justice may be done in the premises.

Dated Honolulu, T. H., August 8th, 1917.

CAROLINE J. ROBINSON,
Plaintiff in Error,
By HENRY HOLMES,
CLARENCE H. OLSON,
Her Attorneys. [143]

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors under the Will of Eliza Roy, Deceased, Defendants in Error. Assignment of Errors on Return to Writ of Error Returnable to United States Circuit Court of Appeals for the Ninth Circuit. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. [144]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,
Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants in Error.

Supersedeas and Cost Bond on Writ of Error Returnable to U. S. Circuit Court of Appeals.

KNOW ALL MEN BY THESE PRESENTS: That we, Caroline J. Robinson, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto Lorrin A. Thurston and John D. Paris, Executors under the will of Eliza Roy, deceased, in the sum of FIVE HUNDRED DOLLARS ($500.00), to the payment whereof, well and truly to be made, we do hereby jointly and severally firmly bind ourselves and our respective heirs, successors, executors and administrators.

THE CONDITION of this obligation is as follows:

WHEREAS, in an action at law heretofore pending in and before the Supreme Court of the Territory of Hawaii, wherein said bounden principal was plaintiff in error, and obligees were defendants in error, the said Supreme Court did, on the 21st day of June, 1917, order, render and enter a judgment of said Supreme Court, wherein and whereby there was and is affirmed a certain judgment theretofore, to wit, the 18th day of July, 1916, rendered and entered

in and by the Circuit Court for the First Circuit of said Territory, in a cause wherein said bounden principal was plaintiff, [145] and said obligees were defendants, and which said judgment was in favor of said defendants; and whereas said bounden principal has applied for, and is about to sue out, a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii to the end that the judgment of the said Supreme Court, above described, may be reviewed by said United States Circuit Court of Appeals for the Ninth Circuit, and has taken, or is about to take, such further and other proceedings as may be necessary to obtain a review by said United States Circuit Court of Appeals for the Ninth Circuit of the judgment last aforesaid;

NOW, THEREFORE, if the said bounden principal shall prosecute said writ of error to effect, and shall answer all damages and costs if she fails to make her plea good, then the above obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principal has set her hand and seal, and the said surety has caused its name and corporate seal to be set, hereunto this 8th day of August, 1917.

CAROLINE J. ROBINSON,

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By ARTHUR BERG,

Attorney in Fact,

By JAMES MACCONEL, (Seal)

Agent,

Surety.

The foregoing bond is hereby approved as to form and sufficiency, this 8th day of August, 1917.

[Seal] A. G. M. ROBERTSON,

Chief Justice, Supreme Court of the Territory of Hawaii. **[146]**

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Supersedeas and Cost Bond on Writ of Error, Returnable to U. S. Circuit Court of Appeals. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. **[147]**

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Writ of Error to the Supreme Court of the Territory of Hawaii.

The United States of America,—ss.

The President of the United States to the Honorable Justices of the Supreme Court of the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in

the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you, or some of you, between Caroline J. Robinson, plaintiff in error, and Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by their complaint appears:

We being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth [148] Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 8th day of August, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing is hereby allowed this 8th day of August, 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors under the Will of Eliza Roy, Deceased, Defendants in Error. Writ of Error to the Supreme Court of the Territory of Hawaii. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. **[149]**

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,
Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,
Defendants in Error.

Citation on Writ of Error Returnable to U. S. Circuit Court of Appeals.

The United States of America,—ss.

To Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit

Court of Appeals for the Ninth Circuit, at San Francisco, State of California, within thirty (30) days after the date of this citation, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Caroline J. Robinson is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of August, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal] A. G. M. ROBERTSON,
Chief Justice, Supreme Court of the Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,
Clerk, Supreme Court of the Territory of Hawaii.

[150]

Due service of the within citation and receipt of copy thereof is hereby admitted this 8th day of August, 1917.

ANDREWS & PITTMAN,
Attorneys for Defendants in Error, Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased.

[Endorsed]: No. 993. Supreme Court of the Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston

and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Citation of Writ of Error Returnable to Circuit Court of Appeals.

Filed August 8, 1917, at 12:05 P. M. and issued same for service. J. A. Thompson, Clerk.

Returned August 8, 1917, at 3:25 P. M. J. A. Thompson, Clerk. **[151]**

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Praecipe for Transcript of Record on Writ of Error Returnable to U. S. Circuit Court of Appeals.

To JAMES A. THOMPSON, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of a record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the Writ of Error heretofore issued by said Court, and include in said transcript the following pleadings, proceedings, opinions, judgments and papers on file in said cause, to wit:

1. Petition for Writ of Error to Circuit Court of the First Circuit;
2. Notice of Issuance of Writ of Error, and Assignment of Errors;
3. Bond on Writ of Error.
4. Summons of the Supreme Court of Hawaii, with Return of Service Attached Thereto;
5. Writ of Error;
6. Bill of Complaint;
7. Term Summons of Circuit Court of the First Circuit, with Return Service Attached Thereto; [152]
8. Answer of Defendants;
9. Amended Answer of Defendants;
10. Opinion and Decision of Hon. C. W. Ashford, First Judge, Circuit Court, First Circuit;
11. Plaintiff's Exceptions to Decision;
12. Judgment of the Circuit Court, First Circuit;
13. Plaintiff's Exception to Judgment.
14. Clerk's Minutes of the Circuit Court, First Circuit;
15. Transcript of Testimony;
16. Plaintiff's Exhibit "A";
17. Plaintiff's Exhibit "B";
18. Opinion of the Supreme Court of Hawaii;
19. Judgment of the Supreme Court of Hawaii;
20. Minutes of Clerk of Supreme Court;
21. Rule 4 of Circuit Court, First Circuit;
22. Petition for Writ of Error and Supersedeas Returnable to U. S. Circuit Court of Appeals, Affidavit Thereto Attached, and Order Allowing Said Writ;

23. Assignment of Errors;
24. Supersedeas and Cost Bond on Writ of Error;
25. Writ of Error to Supreme Court of the Territory of Hawaii;
26. Citation and Acknowledgment of Service Thereof;

You will also annex to and transmit with the record **[153]** the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and citation with return of service, your return of the writ of error under the seal of the Supreme Court of the Territory of Hawaii and also your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Honolulu, August 10th, 1917.

Respectfully,

HOLMES & OLSON,

Attorneys for Plaintiff in Error.

Service of a copy of the foregoing Praecipe for Transcript is hereby acknowledged.

ANDREWS & PITTMAN,

W. B. P.,

Attorneys for Defendants in Error.

[Endorsed]: No. 993. In the Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Praecipe for Transcript of Record on Writ of Error Returnable to U. S. Circuit Court of Appeals. Holmes & Olson, 863 Kaahumanu Street, Honolulu, Attorneys for Plaintiffs in Error.

Filed August 10, 1917, at 9:45 A. M. J. A. Thompson, Clerk. **[154]**

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Writ of Error to the Supreme Court of the Territory of Hawaii.

The United States of America,—ss.

The President of the United States to the Honorable Justices of the Supreme Court of the Territory of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you, or some of you, between Caroline J. Robinson, plaintiff in error, and Lorrin A. Thurston and John D. Paris, executors under the will of Eliza Roy, deceased, defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by their complaint appears:

We being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth **[155]** Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 8th day of August, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

The foregoing is hereby allowed this 8th day of August, 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii. **[156]**

[Endorsed]: No. 993. Supreme Court, Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Writ of Error

to the Supreme Court of the Territory of Hawaii. Filed August 8, 1917, at 12:05 P. M. J. A. Thompson, Clerk. [157]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Citation on Writ of Error Returnable to U. S. Circuit Court of Appeals.

The United States of America,—ss.

To Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased: GREETING:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days after the date of this citation, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Caroline J. Robinson is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should

not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 8th day of August, in the year of our Lord one thousand nine hundred and seventeen.

A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Seal] Attest: J. A. THOMPSON,
Clerk, Supreme Court of the Territory of Hawaii.
[158]

Due service of the within citation and receipt of copy thereof is hereby admitted this 8th day of August, 1917.

ANDREWS & PITTMAN,
Attorneys for Defendants in Error, Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased. **[159]**

[Endorsed]: No. 993. Supreme Court of the Territory of Hawaii. October Term, 1916. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Citation of Writ of Error Returnable to Circuit Court of Appeals. Filed August 8, 1917, at 12:05 P. M., and Issued Same for Service. J. A. Thompson, Clerk. Returned August 8, 1917, at 3:25 P. M. J. A. Thompson, Clerk. **[160]**

In the Supreme Court of the Territory of Hawaii.

CAROLINE J. ROBINSON,

Plaintiff in Error,

vs.

LORRIN A. THURSTON and JOHN D. PARIS, Executors Under the Will of ELIZA ROY, Deceased,

Defendants in Error.

Certificate of Clerk to Transcript of Record.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error and in obedience thereto, the original of which said Writ of Error is herewith returned, being pages 155 to 157, both inclusive, of the foregoing transcript of record, and in pursuance of the Praecipe to me directed, a copy whereof is hereto attached, being pages 152 and 154, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 131, both inclusive, and pages 133 to 151, both inclusive, and I DO CERTIFY the same to be full, true and correct copies of the pleadings, exhibits, testimony, clerk's minutes, record, proceedings, opinions and final judgment which are on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii in the case entitled

in the said Court, "Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error," and in said Supreme Court numbered and docketed as Number 993. **[161]**

I FURTHER CERTIFY that page 132 of the foregoing transcript of record is a full, true and correct copy of Rule 4, of the Rules of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, which were approved by the Supreme Court of said Territory on the 12th day of January, 1914, and that said Rule 4 was in force and effect on the 30th day of March, 1914, and has been in force and effect ever since said last-mentioned date.

I DO FURTHER CERTIFY that the original citation on writ of error with acknowledgment of service thereof, being pages 158 to 160, both inclusive, of the foregoing transcript of record, are hereto attached and are herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is Thirty-seven and 70/100 ($37.70) Dollars, and that said amount has been paid by Caroline J. Robinson, the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 15th day of August, A. D. 1917.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawai. **[162]**

[Endorsed]: No. 3038. United States Circuit Court of Appeals for the Ninth Circuit. Caroline J. Robinson, Plaintiff in Error, vs. Lorrin A. Thurston and John D. Paris, Executors Under the Will of Eliza Roy, Deceased, Defendants in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed August 25, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.